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Report of Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November-9 December 2005)

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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative convention on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.48.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its sixteenth session in Vienna from 28 November to 9 December 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Brazil, Cameroon, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

3. The session was also attended by observers from the following States: Cuba, Denmark, Dominican Republic, Finland, Greece, Indonesia, Iraq, Kuwait, Latvia, the Netherlands, New Zealand, Norway, Panama, Peru, Philippines, Romania and Senegal.

4. The session was also attended by observers from the following international organizations:

(a) United Nations system: United Nations Conference on Trade and Development (UNCTAD), United Nations Economic Commission for Europe (UNECE);

(b) Intergovernmental organizations invited by the Commission: Council of the European Union, European Commission (EC), Hague Conference on Private International Law (HCCH), Intergovernmental Organisation for International Carriage by Rail (OTIF);

(c) International non-governmental organizations invited by the Commission: Association of American Railroads (AAR), Comité International des Transports Ferroviaires (CIT), Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), The Baltic and

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

International Maritime Council (BIMCO), and The European Law Students' Association International (ELSA).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)

Rapporteur: Mr. Walter De Sá Leitão (Brazil)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.48);

(b) A note prepared by the Secretariat containing a second revision of the draft convention (A/CN.9/WG.III/WP.56);

(c) Information on jurisdiction and arbitration presented by the Danish delegation at its fifteenth session (A/CN.9/WG.III/WP.49) and a note on the information on scope of application and freedom of contract presented by the Finnish delegation at its fifteenth session (A/CN.9/WG.III/WP.51);

(d) Information on right of control introduced on behalf of the Norwegian delegation at its fifteenth session (A/CN.9/WG.III/WP.50/Rev.1);

(e) Information on transfer of rights introduced by the Swiss delegation at its fifteenth session (A/CN.9/WG.III/WP.52);

(f) A comparative table on limitation levels of carrier liability (A/CN.9/WG.III/WP.53);

(g) A proposal by the Netherlands on arbitration (A/CN.9/WG.III/WP.54);

(h) Information on shipper's obligations presented by the Swedish delegation (A/CN.9/WG.III/WP.55);

(i) Information on delivery of goods presented by the Dutch delegation (A/CN.9/WG.III/WP.57);

(j) A proposal by the United States of America regarding the inclusion of "ports" in draft article 75 of the draft convention in the chapter on jurisdiction (A/CN.9/WG.III/WP.58);

(k) Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration (A/CN.9/WG.III/WP.59).

7. The Working Group adopted the following agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Preparation of a draft convention on the carriage of goods [wholly or partly][by sea];
4. Other business;
5. Adoption of the report.

I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annexes to a note by the Secretariat (A/CN.9/WG.III/WP.56) and discussed various proposals, including the proposal by the Netherlands on arbitration (A/CN.9/WG.III/WP.54) and the proposal by the United States of America regarding the inclusion of "ports" in draft article 75 of the draft convention in the chapter on jurisdiction (A/CN.9/WG.III/WP.58). The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

II. Preparation of a draft convention on the carriage of goods [wholly or partly][by sea]

Jurisdiction—Chapter 16

9. The Working Group was reminded that it had first considered the chapter of the draft convention concerning jurisdiction at its fourteenth session (see A/CN.9/572, paras. 110-150) and most recently at its fifteenth session (see A/CN.9/576, paras. 110-175). The discussion of the provisions on jurisdiction was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

Draft article 75. Actions against the carrier

Inclusion of the text in paragraph (c) regarding "ports"

10. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction in actions against the carrier under draft article 75 (see A/CN.9/572, para. 128; A/CN.9/576, para. 121 and A/CN.9/WG.III/WP.58).

11. General support was expressed for a proposal to remove the square brackets around draft paragraph 75 (c) and to retain the text. It was suggested that the inclusion of the port where goods were initially loaded and finally discharged from a ship as additional bases of jurisdiction was particularly important in the context of door-to-door contracts of carriage, since it provided benefits to both the carrier and the cargo claimant. It was suggested that the carrier would generally prefer to be sued at one of the ports through which the goods passed, rather than at the inland location at which an agent collected or delivered the cargo, while the claimant would have the option to initiate an action against the carrier at the specific port where, for example, damage took place, if it considered it beneficial to do so. It was clarified that whereas including ports on the list of places where judicial proceedings against a carrier could be brought did not guarantee that suit would be filed at the port, excluding them would make a suit at the port impossible.

12. Several advantages were given in support of the proposal to include ports as a basis for jurisdiction pursuant to draft article 75. One advantage was said to be that since damage or loss was more likely to occur in a port because that was where the

cargo was being handled, it would be more convenient to have the claim heard at the port where the loss or damage had occurred, since access to witnesses and other evidence would be more readily available to all parties. Another advantage was said to be that, pursuant to draft article 77, the port might be the only place that the cargo claimant could bring a single action against both the carrier and the performing party, thereby potentially avoiding a multiplicity of actions. In addition, draft paragraph 75 (c) was said to enable a carrier that had been sued to claim contribution or indemnity from a negligent performing party in the same action. Further, litigation at a port was said to provide an attractive forum for litigants because lawyers who practised and judges who presided over courts close to ports were more likely to have maritime expertise, particularly when compared to those of inland courts. Additionally, it was suggested that in some jurisdictions, the exclusion of the ability to litigate at a port could interfere with a court's ability to manage its own docket, for example, in allowing for easier consolidation of actions in major casualty cases.

13. A smaller number of delegations expressed the view that inclusion of a clause on ports would unnecessarily broaden the number of jurisdictions open to the claimant taking action. Some delegations reiterated the view expressed in earlier sessions of the Working Group that the chapter on jurisdiction was unnecessary as a whole, with some suggesting that merchant parties had equal bargaining power and would simply subrogate any claims to their insurers. In response, it was suggested that draft article 75 was intended to be a default rule, and that later discussions in the Working Group on freedom of contract would include a discussion of forum selection in situations where parties had equal bargaining power. Other views were expressed that including ports in draft paragraph 75 (c) detracted from the certainty of the jurisdiction provisions in the draft convention.

Actual or contractual port of loading or discharge, and ports of refuge

14. The Working Group considered the general question of whether "ports" in draft paragraph 75 (c) should refer to ports where actual loading and discharge of the goods took place, or whether the term should refer to the contractual ports. There was strong support for the view that the draft article should refer to the actual ports of loading and discharge. It was noted that although the contractual and actual ports of loading and discharge might often be the same, there would be instances, when, for example, in the case of a port of refuge, the contractual place of discharge was different from the actual port of discharge. Another example was the practice in multimodal transport where, for operational reasons, a carrier might prefer to use a port other than the contractual port of discharge in order to take advantage of an alternative means of transport that would deliver the goods to the consignee more quickly or more cheaply. In addition, the view was expressed that the contract of carriage might only provide for delivery to a port in a particular area only, or not specify any port at all, and that the contractual port of discharge would thus not provide the desired certainty with respect to possible bases of jurisdiction.

15. Some drafting suggestions were made to enhance the clarity of the draft paragraph regarding ports. One suggestion was for the use of terms such as "initial loading" and "final discharge" to be consistent with the terms used in draft article 11 (6). Further, a note of caution was sounded against including terminology mixing contractual and actual ports and thus possibly causing confusion, as, for

example with respect to the article 2 (1) scope of application provisions of the Hamburg Rules.

Other aspects of draft article 75

16. Two other aspects of draft article 75 were considered by the Working Group. The first issue was whether the Working Group was in a position to make a decision between the alternate text in square brackets set out in draft paragraph 75 (d). After some initial views were aired expressing a preference for the term "designated" as being less prone to uncertainty than "agreed upon", it was agreed that a decision on this alternative text would have to await the Working Group's discussion regarding choice of court agreements. Secondly, caution was raised regarding the definition of the term "domicile" in draft paragraph 1 (aa), since, in the national law of some States, "registered office" could be either the central office or a branch office.

Conclusions reached by the Working Group regarding draft article 75

17. After discussion, the Working Group decided that:

- The square brackets in draft article 75 (c) should be removed and the text retained;
- The Secretariat should be requested to improve the wording of paragraph (c), with reference to consistency with other relevant provisions such as draft article 11 (6), to make clear its reference to actual ports of loading and discharge, and to possibly expressly exclude ports of refuge; and
- The Secretariat should be requested to make the adjustments necessary to the definition of domicile in draft paragraph 1 (aa) so as to provide certainty with respect to the term "registered office".

Presentation of Hague Conference Choice of Court Convention

18. The Working Group heard a presentation from the Hague Conference on Private International Law on the main provisions of the recently-concluded Convention on Choice of Court Agreements, 2005 (the Choice of Court Convention). The Working Group was reminded that the Choice of Court Convention contained rules on jurisdiction arising from exclusive choice of court agreements and on recognition and enforcement of judgments relating to those agreements. One of the provisions highlighted was article 22, which allows Contracting States to opt in to the Choice of Court Convention on a reciprocal basis for the recognition and enforcement of judgments granted by a court designated in a non-exclusive choice of court agreement. While no position was advocated by the Hague Conference, it was mentioned that, while the carriage of passengers and goods was excluded from the scope of application of the Convention under article 2 (2)(f), a suggestion had been made to consider linking the draft convention with the Choice of Court Convention. It was also recalled that even without a formal link, states remained free to agree on a bilateral basis to enforce judgments given by a chosen court under the rules of the Choice of Court Convention.

Draft article 76. Exclusive jurisdiction agreements

General discussion

19. The Working Group was reminded that it had considered exclusive jurisdiction clauses at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 130 to 133, and A/CN.9/576, paras. 156 to 168). The Working Group heard that draft article 76 in annexes I and II of A/CN.9/WG.III/WP.56 had been prepared by the Secretariat, bearing in mind those discussions.

Inclusion of a provision on exclusive jurisdiction

20. The Working Group continued its discussions on the basis of the following proposed draft text, based on the drafting suggestions received from some delegations:

"Article 76. Choice of court agreements

"1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction, provided that the agreement conferring it is concluded or documented

"(a) in writing; or

"(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

"2. The jurisdiction of a court or courts chosen in accordance with paragraph 1 is exclusive if the agreement conferring such jurisdiction is contained in a volume contract and this agreement

"(a) clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and

"(b) either

"(i) this agreement is individually negotiated; or

"(ii) the volume contract contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract.

"3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if the relevant applicable law so provides [, that person is given adequate notice of the place where the action can be brought and the forum is in one of the places designated in article 75 (a), (b) or (c)].

"[4. This article does not prevent a Contracting State from giving effect to a choice of court agreement under less strict conditions than those laid down in paragraph 2 provided that it makes a corresponding declaration upon signature or ratification. Nothing in this paragraph prevents a court specified in article 75 (a), (b) or (c) from exercising its jurisdiction.]"

21. It was explained that the proposed text of draft article 76 aimed at reaching a compromise between those delegations that advocated that no exclusive choice of court clauses should be recognized, and those that advocated that all exclusive choice of court clauses should be recognized. The proposal aimed at providing common minimum standards for the validity of choice of court agreements and by allowing a wider recognition of such agreements by States willing to do so. The Working Group heard that the compromise represented by the proposal was intended to allow for the draft convention to be ratified as broadly as possible.

22. The intended operation of the proposal was described. It was observed that proposed article 76 was intended to broaden the treatment of exclusive jurisdiction agreements to include choice of court agreements in general. Proposed paragraph 76 (1) set out the requirements for validity of choice of court agreements, while proposed paragraph 76 (2) made it clear that exclusive choice of court clauses could be effectively concluded only in volume contracts that met the listed minimum standards. It was further explained that proposed paragraph 76 (3) extended an exclusive choice of court agreement that met the paragraph 2 requirements to third parties to the volume contract only when the applicable law allowed and when the additional bracketed conditions intended to safeguard those parties were met. In addition, the function of proposed paragraph 76 (4) was described as allowing Contracting States to give effect to choice of court agreements under less strict conditions than those set out in proposed paragraph 2, provided that a declaration to that effect was made upon signature or ratification of the draft convention. Finally, it was explained that the last sentence in proposed paragraph 4 was intended to allow a court designated by draft paragraphs 75 (a), (b) or (c) to either accept or decline jurisdiction in the face of an exclusive choice of court agreement that did not meet the requirements of proposed paragraph 2.

General reaction to proposed regime for choice of court agreements

23. It was suggested that the draft convention should not contain a chapter dealing with jurisdiction at all, and that it should instead continue the situation under the Hague-Visby Rules where the matter was left to the freedom of the parties. In response, it was observed that contractual freedom under the Hague-Visby Rules could be affected by restrictions at the national level, and that therefore the harmonization of the law in a uniform instrument would be welcome. Support was expressed for the scheme set out in proposed article 76 to preserve the status quo regarding the acceptance of choice of court agreements, and to allow for exploration of the scheme as a starting point for potential future harmonization.

24. There was support for the view that in the interests of clarity, the validity of exclusive choice of court agreements should not be limited to volume contracts, but should be extended to all contracts of carriage. Further, it was observed that any reference to volume contracts in the chapter on jurisdiction would depend on the outcome of the discussions on volume contracts in general in draft article 95, which still contained some bracketed text. In response to these concerns, it was suggested that the proposed text's modest ambitions for harmonization regarding choice of court agreements required starting at a level on which there could be potential agreement, and it was thought best to limit the initial application to situations involving sophisticated parties of equal bargaining power, such as in the case of volume contracts. It was also clarified that States that wished to extend the validity

of exclusive choice of court agreements to contracts of carriage beyond volume contracts were free to do so under proposed paragraph 76 (4).

25. Other concerns were raised that the scheme for choice of court agreements in proposed article 76 required a potential claimant to enter into too many different levels of inquiry to establish appropriate jurisdiction, thus costing the claimant both time and certainty. In addition, it was observed that the proposal did not solve the problem of geographically remote shippers potentially having to bear the costs of litigating in other States.

Proposed paragraph 76 (1)

26. It was observed that proposed paragraph 76 (1) set the conditions for the validity of all choice of court agreements. It was further observed that the requirements in proposed paragraph 76 (1) had been inspired by article 3 of the Choice of Court Convention. Concern was expressed that failure to mention the competence of a court in this paragraph could result in inadvertently overriding domestic procedural rules by providing a basis for a court to claim jurisdiction when it had none. It was noted that proposed paragraph 76 (1) should refer to the competence according to national law of the court chosen in the choice of court agreement, in keeping with similar references in the chapeau of both draft articles 75 and 77.

Proposed paragraph 76 (2)

27. It was observed that proposed paragraph 76 (2) set out the conditions for the validity of exclusive choice of court agreements, which were parallel to those required for the validity of volume contracts in draft paragraph 95 (1). In addition to the conditions of either individual negotiation or a prominent statement of the existence and location of the exclusive choice of court agreement in the volume contract, a valid exclusive choice of court agreement also required the name and location of the chosen court and the names and addresses of the parties.

28. Suggestions were made regarding the specific drafting of paragraph 2. The view was expressed that to be accurate, proposed subparagraph 76 (2)(b)(i) should refer to individually negotiated volume contracts rather than to individual clauses of the contract, such as choice of court clauses. It was suggested that this paragraph should also refer to the competence according to national law of the court chosen in the choice of court agreement, as referred to above with respect to paragraph 1.

Proposed paragraph 76 (3)

29. It was indicated that proposed paragraph 76 (3) set out the requirements to extend paragraph 2 exclusive choice of court agreements to third parties to the volume contract. In particular, it was observed that the exclusive choice of court agreement must be valid between the parties to the volume contract, and the court chosen must be located in one of the jurisdictions designated by draft paragraph 75 (a), (b) or (c). In addition, it was required that third parties have adequate notice of the place where the action could be brought and that the relevant applicable law allowed third parties to be so bound.

30. It was observed that the reference to "relevant applicable law" should be interpreted as a reference to the national law of the court seized, including its

private international law rules. It was suggested that this interpretation should be made explicit in the text for the sake of clarity. A question was raised regarding whether the requirement of "adequate notice" would be decided on the basis of applicable national law.

31. It was explained that the bracketed text at the end of proposed paragraph 76 (3) intended to provide a minimum standard under the draft convention to make exclusive choice of court agreements binding on third parties to a volume contract, but that a court could, through its national law, require more stringent standards for such agreements to be binding on third parties. Further, it was observed that deletion of the bracketed text would leave the matter entirely to applicable law. In this regard, it was suggested that the bracketed text should be deleted so as not to cause confusion regarding whether the notice requirement was intended to change national law that required the consent of third parties to be bound instead of mere notice. An alternative suggestion was made to replace the bracketed text with the words "and such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record]." However, the view was also expressed that the square brackets in proposed paragraph 3 should be deleted and the text inside retained in order to include minimum requirements to protect third parties. In addition, it was noted that, in business practice, the need for protection of third parties to the volume contract was limited since these third parties were often actually subsidiaries of the shipper, related corporate entities, or they were freight forwarders.

32. Another view was expressed that in order to better protect third parties to the volume contract, consent should replace notice as a requirement to bind them to exclusive choice of court agreements. Reference in this respect was made to draft subparagraph 95 (6)(b), which required consent to bind third parties to the terms of volume contracts. In response, it was suggested that proposed paragraph 76 (3) dealt with forum selection matters, seen as procedural in certain jurisdictions, while draft subparagraph 95 (6)(b) directly affected substantive rights and obligations and therefore required greater caution and a higher standard of protection. An additional view was expressed that requiring the consent of third parties to be bound by exclusive choice of court agreements would unreasonably burden current business practice, which often saw long strings of sales of the transported goods.

Proposed paragraph 76 (4)

33. It was explained that proposed paragraph 76 (4) intended to permit choice of court agreements based on requirements less strict than those set out in proposed paragraphs 76 (1) and (2), provided that the Contracting State had given the required notice. By way of example, it was indicated that a court located in a State recognizing choice of court agreements under proposed paragraph 76 (4) and otherwise competent under draft article 75 of the draft convention could decline jurisdiction in the presence of a valid choice of court agreement that did not meet the requirements of paragraph 2.

34. By way of further example, it was observed that, if a carrier was located in a State that recognized exclusive jurisdiction clauses and the shipper was in a State that did not do so, the carrier could seek a non-declaratory judgment or, where available, an anti-suit injunction, in a court of its State, and the shipper would be unable to obtain withdrawal of the action under proposed paragraph 80 (2). It was

added that, in this example, the shipper could sue the carrier in a draft article 75 court in the shipper's own State, but because of proposed paragraph 76 (4), the shipper could not demand that the carrier withdraw its non-declaratory judgment action under proposed paragraph 80 (2). However, it was added, that the carrier who obtained a non-declaratory judgment or an anti-suit injunction in this example would not be able to enforce it in a State that did not recognize exclusive jurisdiction clauses.

35. By way of additional example, it was said that if the shipper in the example in the paragraph above sued in its State, where exclusive jurisdiction clauses were not accepted, and then tried to enforce its judgment in the State of the carrier, where exclusive jurisdiction clauses were enforced, the judgment would be refused recognition and enforcement as coming from a non-competent court.

36. It was further observed that, in the case described in paragraph 34 above, concern was expressed that the combined operation of a proposed article 81 bis and proposed paragraph 76 (4) could be that if a judgment was rendered based on paragraph 4, courts in other jurisdictions might feel they had an obligation to recognize it under proposed article 81 bis. In order to clarify that courts in other jurisdictions were allowed to recognize such a decision, but were not bound to do so, it was suggested that a sentence be added to proposed article 81 bis to indicate that that article did not require a Contracting State to recognize or enforce a decision from another Contracting State that was based on the application of the first sentence of proposed paragraph 76 (4).

37. It was suggested that, for the sake of precision, proposed paragraph 76 (4) should refer to choice of court agreements that "did not meet the requirements of proposed paragraphs 76 (1) and (2)", instead of referring to "less strict conditions than those laid down in paragraph 2". Alternative text was suggested in this regard as follows, "This article does not prevent a contracting State from giving effect to a choice of court agreement which does not meet the requirements in paragraph 1 or 2", and then continuing on with the existing text, "provided that it ...". It was further observed that this drafting suggestion would permit a Contracting State to give effect to an exclusive choice of court agreement between the parties of the contract as well as with respect to third parties since the validity of the agreement against third parties was not covered in proposed paragraphs 1 and 2. A further observation was made that proposed paragraph 4 was not intended to authorize anti-suit injunctions, nor had that approach been suggested by other delegations.

38. The view was expressed that the operation of proposed paragraph 76 (4) might lead to multiple proceedings. It was indicated in response that the proposed scheme would also reduce the number of proceedings in at least two circumstances: in cases in which proposed paragraph 80 (2) operated to allow a request for withdrawal, and the situation in which otherwise competent courts would recognize exclusive choice of court agreements and decline jurisdiction.

39. It was suggested that the requirement of a formal declaration by a Contracting State to give effect to choice of court agreements on conditions less strict than those set out in proposed paragraph 2 should be substituted with a less formal mechanism. However, it was observed that any substitute mechanism should fulfil the two intended purposes of ensuring that governments and not individual courts make the decision to apply less strict conditions, and of facilitating access to information

regarding the conditions necessary for the validity of exclusive choice of court clauses in other Contracting States.

Conclusions reached by the Working Group regarding proposed article 76:

40. After discussion, the Working Group decided that:

- Proposed article 76 should be revised in light of the observations of the Working Group expressed above.

Draft article 77. Actions against the maritime performing party

General discussion and "[initially]" and "[ultimately]"

41. The Working Group was reminded that draft article 77 had been inserted into the draft convention in response to a decision taken during its fourteenth session (see A/CN.9/572, paras. 116-117) to create a separate provision with respect to establishing jurisdiction for actions against a maritime performing party. It was recalled that two types of maritime performing party were thought to be relevant in this regard: the more stationary parties, such as stevedores and terminal operators, and the ocean carrier that was not the contracting carrier. It was suggested that, bearing in mind these two groups of maritime performing parties, the "port" where the goods were "initially received" and "ultimately delivered" were appropriate jurisdictions, such that the word "port" should replace "place" and that the square brackets around the words "initially" and "ultimately" should be deleted and the text retained. There was general agreement with this proposal.

Reference to competence of "a court in a Contracting State"

42. The view was expressed that there was a problem in the chapeau of draft article 77 that was repeated from the chapeau of draft article 75 with respect to the phrase "in a court in a Contracting State that, according to the law of the State where the court is situated, is competent". It was suggested that this phrase was unclear, since it could refer to either the national or international competence of a court. It was suggested that this phrase should be clarified in both draft articles 75 and 77.

43. Difficulty was also expressed with respect to the requirement that the court referred to in draft article 77 was required to be in a Contracting State. The view was expressed that it was conceivable that none of the locations set out in paragraphs (a) and (b) of draft article 77 would be in a Contracting State in a particular situation, and that this could result in a potential claimant under draft article 77 being without an appropriate jurisdiction in which to sue the maritime performing party. While the requirement that the court be in a Contracting State was also set out in draft article 75, it would not cause the same difficulty, since the contractual place of receipt and delivery would provide a certain jurisdiction. A related problem was said to be that paragraph (b) of draft article 77 did not restrict the port to the one in which the maritime performing party operated, and that it could cause a defendant unnecessary hardship if the claim were made in a port in which it did not operate.

Conclusions reached by the Working Group regarding draft article 77:

44. After discussion, the Working Group decided that:

- The square brackets around the words "initially" and "ultimately" would be deleted and words retained in the text;
- The word "port" in paragraph (b) should replace the word "place" in both locations; and
- The problems in the text regarding the competence and location of the court in a Contracting State, and the possibility of taking an action against a maritime performing party in a port in which it did not operate would be considered in a revised text of draft article 77.

Draft article 78. No additional bases of jurisdiction

45. The Working Group heard that an additional reference should be made in draft article 78 to draft article 76. The provision was approved with that addition.

Conclusions reached by the Working Group regarding draft article 78:

46. After discussion, the Working Group decided to approve the text of draft article 78, with the addition of a reference to article 76.

Draft article 79. Arrest and provisional or protective measures

General discussion

47. The Working Group was reminded that it had considered draft provisions on arrest and provisional or protective measures during its fourteenth (see A/CN.9/572, paras. 137 to 139) and fifteenth sessions (see A/CN.9/576, paras. 129 to 142).

Paragraph 1

48. It was suggested that the goal of ensuring that jurisdiction with regard to provisional and protective measures would not be affected by the jurisdiction provisions in the draft convention could be achieved and draft paragraph 79 (1) could be simplified by deleting subparagraph (a) and by adding the phrase "including arrest" to the end of subparagraph (b). However, there was support for the view that this proposal would not fully address the relationship between the draft convention and the existing international instruments dealing with arrest, i.e. the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on the Arrest of Ships, 1999 (the Arrest Conventions). It was observed that these instruments contained provisions not only regarding jurisdiction for arrest as a provisional or protective measure, but also with regard to jurisdiction on the merits of the case under the Arrest Conventions. There was support for the view that, whatever the treatment given to jurisdiction under the Arrest Conventions, it should not result in a broadening of the list of general bases for jurisdiction in actions against the carrier contained in draft article 75. It was suggested that the issue of jurisdiction regarding the merits of the arrest case should be considered as a matter of conflict of conventions and would be better dealt with in the chapter of the draft convention on final clauses.

49. The view was also expressed that the text of draft paragraph 79 (1) contained in A/CN.9/WG.III/WP.56 would adequately address matters relating to the relationship between jurisdiction for the draft convention and for arrest as a provisional or protective measure. It was also suggested that article 21 (2) of the Hamburg Rules could be considered in terms of an alternative approach, or that the matter could be entirely left to national law. Another view was expressed that draft article 79 could be moved in its entirety to the chapter on final clauses in the draft convention.

Conclusions reached by the Working Group regarding draft paragraph 79 (1):

50. After discussion, the Working Group decided that:

- The text of draft paragraph 79 (1) should be revised by deleting subparagraph (a) and by adding the phrase "including arrest" to the end of subparagraph (b); and
- A separate provision on conflict of conventions should take into account the issue of the merits of the arrest case and should be placed in the chapter on final clauses in the draft convention.

Paragraph 2

51. It was observed that, in light of the differences among the various national laws, drafting an exhaustive list of provisional or protective measures would be a challenging task of uncertain result. It was therefore suggested that draft paragraph 79 (2), containing such a list, should be deleted and that the definition of provisional or protective measures should be left to national law.

Conclusions reached by the Working Group regarding draft paragraph 79 (2):

52. After discussion, the Working Group decided that:

- The text of draft paragraph 79 (2) should be deleted.

Draft article 80. Consolidation and removal of actions

General discussion

53. The Working Group was reminded that it had previously considered a provision on consolidation and removal of actions at its fifteenth session (see A/CN.9/576, paras. 147 to 152). The Working Group heard that Variant C of draft paragraph 80 (1) was the text agreed for further discussion in paragraph 149 of A/CN.9/576, and that Variants A and B of draft paragraph 80 (1) set out two alternative texts from which the Working Group could choose. The text of draft article 80 proposed for consideration by the Working Group was a combination of Variants A and B of paragraph 1, and a modification of draft paragraph 80 (2) as follows:

"Article 80. Consolidation and removal of actions

"[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. [If no place is specified in both articles,

then such action must be instituted in one of the places designated under article 77.]]

"2. If the carrier or maritime performing party institutes an action that directly or indirectly reduces the rights of a person to select the forum under Articles 75 or 77, then the carrier or maritime performing party, at the request of the defendant, must withdraw the action and recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant."

Paragraph 1

54. The view was expressed that the square brackets around the whole of paragraph 1 should be deleted and the text of the paragraph retained. It was thought that the first sentence of paragraph 1 was uncontroversial since it was logical that if a claimant wished to sue a contracting carrier and a maritime performing party in a single action, that it would be required to do so in a court that had jurisdiction for both actions. There was general agreement in that regard.

55. It was felt that the second sentence of paragraph 1 that appeared in square brackets was more controversial, since it allowed an action against both a contracting carrier and a maritime performing party to take place in a jurisdiction designated only by draft article 77 when a single place could not be designated under both draft articles 75 and 77. A view was expressed that, in such a case, it was more important to protect the maritime performing party, and it was proposed that the square brackets around the second sentence should also be removed and the text retained. However, some doubt was expressed both with respect to subjecting the contracting carrier to the heads of jurisdiction under draft article 77 in this manner, and with respect to the interaction between draft articles 76 and 80 (1). For example, concern was expressed that it might be possible to circumvent an otherwise enforceable exclusive jurisdiction clause by suing both the contracting carrier and the maritime performing party in a draft article 77 jurisdiction.

Conclusions reached by the Working Group regarding draft paragraph 80(1):

56. After discussion, the Working Group decided that:

- The concerns raised with respect to the second sentence of draft paragraph 80 (1) and the interaction of the entire paragraph with draft article 76 would be further considered in a subsequent draft of the provision.

Paragraph 2

57. The view was expressed that draft paragraph 80 (2) was intended to provide a solution for those situations when a carrier instituted an action in an attempt to evade the heads of jurisdiction set out in draft articles 75 and 77. It was agreed that the intent of this provision was not to interfere with legitimate actions against the shipper, such as, for example, actions for freight or for damage caused to a ship by cargo. However, some doubt was expressed regarding the suggestion that draft paragraph 80 (2) should be focussed solely on actions for declaratory relief intended to circumvent the heads of jurisdiction in draft articles 75 and 77. The view was expressed that draft paragraph 80 (2) should also cover anti-suit injunctions sought in another forum in order to reduce a party's choice regarding where to bring suit. It

was also suggested that the provision should confine itself to requiring the abusive action to be stayed or withdrawn, and that it might not be possible to require that it be recommenced in a draft article 75 or 77 jurisdiction, particularly if that recommencement were time-barred. In response to this potential problem, it was suggested that the claimant required to recommence an action pursuant to draft paragraph 80 (2) could be granted additional time when faced with a time bar, but that this issue should be considered with respect to chapter 15 on time for suit.

58. A drafting suggestion was made to clarify the provision by deleting the phrase "that directly or indirectly reduces" and inserting the phrase "that merely aims at reducing", or similar language, in its stead.

Conclusions reached by the Working Group regarding draft paragraph 80 (2):

59. After discussion, the Working Group decided that:

- The concerns raised above with respect to draft paragraph 80 (2) would be further considered in a subsequent draft of the provision.

Draft article 81. Agreement after dispute has arisen

General discussion

60. The Working Group was reminded that it had most recently considered a provision on agreement on jurisdiction arising after the dispute had arisen at its fifteenth session (see A/CN.9/576, paras. 169 to 171). There was general support for the text of this provision, provided that its text was reviewed for consistency in light of changes anticipated to other provisions in the chapter on jurisdiction.

Form requirements

61. A question was raised regarding whether the agreement made by the parties should be subject to form requirements similar to those set out in draft paragraph 76 (1), where an agreement on choice of court was required to be evidenced in writing or by electronic means. Two views were expressed. One view was that the draft article should be amended to include form requirements similar to those in draft paragraph 76 (1) on the basis that evidence of an agreement was necessary to protect the parties. It was suggested that where an agreement was concluded orally and a subsequent dispute arose as to whether a court had jurisdiction to hear the case, the lack of evidence as to what was agreed could further complicate the dispute between the parties.

62. The other view expressed was that form requirements should not be included since this would unnecessarily impede negotiations that often take place between the parties once a dispute has arisen. It was stated that in practice, negotiations were often entered into between the parties prior to commencing an action, and when negotiations were unsuccessful, parties might orally or informally agree where to litigate. It was also noted that such agreement could also be arrived at implicitly, through a party simply appearing in a court to defend an action. In addition, it was noted that even article 21 (5) of the Hamburg Rules, which generally provide strong protection for parties, did not stipulate form requirements for agreements on jurisdiction after the dispute has arisen.

Additional clarifications

63. In response to a question raised, it was generally agreed that the draft article did not confer jurisdiction on a court where that court did not have jurisdiction in the first place. It was also clarified that the meaning of the words "after the dispute had arisen" referred to the period following a voyage when the damage had already occurred, but a court had not yet been seized with the claim.

Conclusions reached by the Working Group regarding draft article 81:

64. After discussion, the Working Group decided that:

- The text of draft article 81 should be retained as satisfactory and no form requirement should be added.

Proposed new draft paragraph 81 (2)

65. It was proposed that the draft article 81 should become draft paragraph 81 (1), and that the following text be incorporated into the draft convention as draft paragraph 81 (2):

> "Notwithstanding the preceding articles of this chapter, a court of a Contracting State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction."

General discussion

66. With respect to proposed draft paragraph 81 (2), general support was expressed for the text. The view was expressed that draft paragraph 81 (2) was necessary because it was important for a defendant to be able to enter an appearance only for purposes of contesting the jurisdiction of the court. Moreover, it was thought to be logical for this paragraph to be placed as the second paragraph in the same draft article as draft article 81, so that it would make clear that the first paragraph, or former draft article 81, dealt with agreements on jurisdiction after the dispute had arisen but before a court was seized, and that the second paragraph dealt with disputes once a court was seized with the claim. The view was expressed that it was not obvious that where a defendant entered an appearance to contest jurisdiction, all courts would view the appearance in the same manner, but that the insertion of this paragraph could have a beneficial harmonizing effect in this regard.

67. The view was also expressed, however, that the draft article might be seen to interfere with local procedural law, and it was agreed that the draft paragraph should incorporate wording such as "in accordance with the law of", or similar text that referred to local law, so as to ensure that local procedural law was respected. In response to a question, another clarification was made that it was intended that the court before which an appearance was entered was under no obligation to accept jurisdiction.

68. In response to a concern raised, it was clarified that the words "entered to contest the jurisdiction" did not prevent a defendant who was contesting jurisdiction of a court from also contesting the claim on its merits. Further, on the question of whether a court could assert jurisdiction once an appearance was entered even

where it fell outside the scope of draft articles 75, 76 and 77, it was clarified that the answer would depend on local procedural rules.

Conclusions reached by the Working Group regarding proposed draft paragraph 81 (2):

69. After discussion, the Working Group decided that:

- Draft article 81 should be renumbered as draft paragraph 81 (1) and its title revised;
- The text of draft paragraph 81 (2) set out above should be inserted into the draft convention; and
- Regard should be had in a future draft to the concerns raised regarding local procedural law.

Proposed new draft article 81 bis. Recognition and enforcement

70. It was proposed that the following text of a new draft article 81 bis be incorporated into the draft convention as draft paragraph 81 (2):

"Article 81 bis. Recognition and enforcement

"1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is entitled to recognition and enforcement in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

"2. This article does not require a Contracting State to recognize or enforce a decision from another Contracting State which is based on the application of the first sentence of article 76 (4)."

General discussion

71. It was suggested that draft paragraph 2 was necessary since, in its absence, it was felt that draft paragraph 1 could be interpreted to mean that a court must enforce a judgment even though it might be contrary to local procedural rules. It was explained that the second paragraph was intended to clarify that a State was not required by this provision to recognize or enforce a judgment that would not otherwise be enforceable under its national law.

Conclusions reached by the Working Group regarding proposed draft article 81 bis

72. After discussion, the Working Group decided that:

- Draft article 81 bis should be included in the draft convention as a basis for future discussion, subject to adjustments to the text necessary to accommodate drafting changes to the chapter on jurisdiction as a whole.

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see

above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

"Article 1 (xx) "Competent court"

""Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over a matter.

"Article 75. Actions against the carrier

"Unless the contract of carriage contains an exclusive choice of court agreement that is valid under article 76, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier in a competent court within the jurisdiction of which is situated one of the following places:

"(a) The domicile of the defendant; or

"(b) The contractual place of receipt or the contractual place of delivery; or

"(c) The port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or

"(d) Any place designated for that purpose in accordance with article 76 (1).

"Article 76. Choice of court agreements

"1. If the shipper and the carrier agree that a competent court has jurisdiction to decide disputes that may arise under this Convention, then that court has non-exclusive jurisdiction, provided that the agreement conferring it is concluded or documented

"(a) in writing;[2] or

"(b) by any other means of communication that renders information accessible so as to be usable for subsequent reference.

"2. The jurisdiction of a court chosen in accordance with paragraph 1 is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction

"(a) is contained in a volume contract that clearly states the names and addresses of the parties and either

"(i) is individually negotiated; or

"(ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract; and

"(b) clearly states the name and location of the chosen court.

[2] The form requirement will be treated under article 3.

"3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if this is consistent with applicable law as determined by the [international private law] [conflict of law rules] of the court seized and:

"(a) That person is given adequate notice of the court where the action can be brought;

"(b) The forum is in one of the places designated in article 75 [(a), (b) or (c)].

"4. Subject to paragraph 5, this article does not prevent a Contracting State from giving effect to a choice of court agreement that does not meet the requirements of paragraphs 1, 2, or 3. Such Contracting State must give corresponding notice [to _____].

"5. Nothing in paragraph 4 or in a choice of court agreement effective under paragraph 4 prevents a court specified in article 75 [(a), (b), (c) or (d)] and situated in a different Contracting State from exercising its jurisdiction over the dispute and deciding the dispute according to this Convention. No choice of court agreement is exclusive with respect to an action [against a carrier] under this Convention except as provided by this article.

"Article 77. Actions against the maritime performing party

"In judicial proceedings under this Convention against the maritime performing party, the plaintiff, at its option, may institute an action in a competent court within the jurisdiction of which is situated one of the following places:

"(a) The domicile of the maritime performing party; or

"(b) The port where the goods are initially received by the maritime performing party or the port where the goods are finally delivered by the maritime performing party.

"Article 78. No additional bases of jurisdiction

"Subject to articles 80 and 81, no judicial proceedings under this Convention against the carrier may be instituted in a court not designated under articles 75, 76 or 77.

"Article 79. Provisional or protective measures

"Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. [A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless

"(a) the requirements of this chapter are fulfilled; or

"(b) an international convention that according to its rules of application applies in that State so provides.]

"Article 80. Consolidation and removal of actions

"1. Except when there is an exclusive choice of court agreement that is valid under article 76, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, then the action may be instituted only in a court designated under both articles 75 and 77. If no such court is available, the action must be instituted in a court designated under article 77 (b) if such court is available.

"2. Except when there is an exclusive choice of court agreement that is valid under article 76, a carrier or a maritime performing party that institutes an action that [would affect] [merely aims at affecting] the rights of a person to select the forum under articles 75 or 77, must at the request of the defendant, withdraw that action and may recommence it in one of the courts designated under articles 75 or 77, whichever is applicable, as chosen by the defendant.[3]

"Article 81. Agreements after the dispute has arisen and jurisdiction when the defendant has entered an appearance

"Notwithstanding the preceding articles of this chapter:

"(a) After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

"(b) A competent court before which a defendant appears, without contesting the jurisdiction in accordance with the rules of that court, has jurisdiction over the parties.

"Article 81 bis. Recognition and enforcement

"1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is to be recognized and enforced in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

"2. This article does not apply to a decision rendered in another Contracting State that has jurisdiction under article 76 (4).

"Article XX. Participation by Regional Economic Integration Organizations

"1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.

[3] It might be necessary to arrange the provisions of time for suit for such cases when the original action was brought within the time period but the recommencement was not.

"2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a Regional Economic Integration Organization where the context so requires."

74. The Working Group heard a brief report from the delegations proposing the revised text for the chapter on jurisdiction. It was reported that against a background of divergent interests and views in the Working Group regarding the draft provisions on jurisdiction, a delicate compromise had been achieved and that it was reflected in the revised text. It was observed that although total harmonization of the jurisdiction provisions was not possible, it was thought that the compromise achieved could be acceptable to the Working Group, because it was seen to be preferable to the alternative, which was to exclude jurisdiction from the draft convention.

75. There was general support expressed for the proposed compromise set out in the revised articles, particularly given the complexity of the issues, and the view was expressed that a careful balancing of interests had been achieved. The view was expressed that deletion or revisions in substance of the draft compromise could destroy the compromise accomplished.

76. In response to a request for clarification of draft article 76 (4), it was observed that the intention of the notice requirement was to indicate that a policy decision had been made regarding paragraph 4 by a Contracting State rather than by individual courts within that State deciding whether or not they would choose to apply paragraph 4. It was further clarified that it was not intended that such a notification would necessarily require a change to the law in the Contracting State but rather that it required a Contracting State to inform the rest of the world whether it would give effect to exclusive choice of court agreements on less strict conditions than those set out in paragraph 2.

77. In further reference to the notice requirement under draft article 76 (4), it was observed that receiving the content of national law might not be appropriate for a depositary, and it was thought that notices of the nature contemplated could be extensive, even consisting of case law, and that they could require translation to other languages, a matter that could raise administrative issues with the depository, and that could create a hurdle for the adoption of the draft convention. In response to those concerns, several views were expressed that such notices could consist of very simple statements regarding whether or not a Contracting State would apply paragraph 4, or that they could be sent to organizations other than the depositary for collection and dissemination. There was general agreement that this matter should be discussed further at a later stage.

78. A concern was raised with respect to the structure of the chapter on jurisdiction, since draft article 75 was concerned only with claims against the carrier, followed by draft article 76, which regulated actions against both the shipper

and the carrier, but that it seemed that other than draft article 76, actions by the carrier against the shipper were not treated in the subsequent provisions. The view was expressed that this was not an oversight in regard to draft article 75, since the compromise achieved by the entire chapter was intended to enable cargo interests to have access to a reasonable forum to resolve disputes notwithstanding the existence of an exclusive jurisdiction clause which may have been placed in the contract of carriage by the carrier. In that regard, it was suggested that the brackets around the words "against a carrier" in draft article 76 (5) should be deleted so as to bind a carrier to an exclusive jurisdiction forum that it had selected. However, in terms of the observation regarding the overall structure of the chapter, it was observed that article 81 bis had indeed been intended to be applicable to decisions in legitimate actions by the carrier against the shipper, and that if that was not the case, adjustments should be made to the text of draft article 81 bis.

79. Concerns were also raised regarding the clarity of the text with respect to the intention of draft article 81 bis. The view was expressed that that provision meant that a State that gave notice under draft article 76 (4) would not be required by draft article 81 bis to recognize a judgment from a State that did not recognize the exclusiveness of the jurisdiction clause. It was agreed that, if necessary, the text of draft article 81 bis should be clarified to reflect this position.

80. A further concern was raised regarding the relationship between paragraphs 4 and 5 of draft article 76. Since draft article 76 (4) was thought to be the core of the compromise on this chapter, it was said to be important to establish why its opening phrase made it subject to paragraph 5. In particular, it was thought that paragraph 4 should not be made subject to the second sentence of paragraph 5, and that it should be made a separate paragraph under draft article 76.

81. A number of views were also expressed reiterating the position that no articles on jurisdiction should be included in the draft instrument. It was also suggested that while the spirit of the compromise was appreciated, the revised articles did not go far enough in promoting uniformity but instead would lead to forum shopping and the filing of a multiplicity of suits thereby reducing certainty and increasing costs to litigants. A further view was reiterated that exclusive jurisdiction clauses should be given full effect in the draft instrument and that the view that such an approach would be unfair to third parties was untenable because insurance could be obtained and third parties could always obtain the information regarding the jurisdiction from public sources or from the carriers themselves.

82. A number of drafting suggestions were made. One suggestion agreed upon was the inclusion of the word "and" between the draft article 76 (a) and (b). Other drafting suggestions were to replace the words "in accordance with the law of the Contracting State" in draft article 81 bis (1) with the words "subject to the conditions laid down in the law of the Contracting State" to enhance the clarity of the draft article. The view was also expressed that the wording of draft article 81 bis could be a little stringent and might imply that a court operating under draft article 76 (4) might not recognize a judgment of another court operating under the same draft article. It was also suggested that the earlier version of draft paragraph 81 bis (2) set out in paragraph 70 above was preferable as it allowed States that required draft paragraph 81 bis (1) as a legal basis for the recognition of judgments generally, to recognize decisions made pursuant to draft

paragraph 76 (4). A suggestion was also made that draft article 76 (3) should contain a clear conflict of law rule to determine the law governing third parties.

83. Draft article XX, relating to the participation of regional economic integration organizations, was not discussed.

Conclusions reached by the Working Group on proposed jurisdiction chapter:

84. After discussion, the Working Group decided that:

- The compromise contained in the proposed draft text for chapter 16 was both acceptable and accepted, with some reservations regarding the notice given to third parties under draft article 76 (3);
- The word "and" should be included between draft paragraphs 76 (a) and (b); and
- Further drafting suggestions and clarifications should be considered in light of the comments expressed in the paragraphs above.

Arbitration—Chapter 17

General discussion

85. The Working Group was reminded that it had considered the chapter on arbitration during its fourteenth (see A/CN.9/572, paras. 151 to 157) and fifteenth sessions (see A/CN.9/576, paras. 176 to 179). It was recalled that during those sessions of the Working Group, two strong views were expressed. One view was that the principle of freedom of arbitration was deeply rooted and that existing arbitration instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration provided an adequate framework for arbitration, thus obviating the need for such a chapter in the draft convention. Another view was that arbitration should be available to the parties to a dispute, but that it should not be capable of being used by parties in order to circumvent the bases of jurisdiction set out in draft article 75 of the draft convention.

86. The substance of the proposal contained in A/CN.9/WG.III/WP.54 was explained to the Working Group. It was said that the proposal was intended as an effort to reach a compromise between the views expressed on arbitration during the fourteenth and fifteenth sessions. The main aspects of that compromise were said to be the deletion of the entire chapter on arbitration (see A/CN.9/WG.III/WP.54, para. 5 (e)), and the addition in the draft convention of draft paragraph 78 (2) (see A/CN.9/WG.III/WP.54, para. 5 (b)), intended to ensure that the rules in the draft convention on jurisdiction could not be circumvented. An additional aspect of the proposal was to include a reference in draft article 81 to make effective any agreement made by the parties to refer a dispute that had arisen to arbitration. Finally, it was explained that the intention of the compromise was to preserve the status quo with respect to the use of arbitration in the maritime transport industry by providing minimal arbitration rules with respect to the liner industry, but providing

for freedom of arbitration in the non-liner industry through the addition of draft article 81 bis ((see A/CN.9/WG.III/WP.54, para. 5 (e)).

87. In addition, the comments expressed in A/CN.9/WG.III/WP.59 were explained by reference to the final paragraph of that document, which suggested that, in light of widespread reliance on arbitration by the maritime industry in general, the most appropriate solution in the draft convention would be the inclusion of a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification.

Unqualified freedom to arbitrate

88. There was support for the view that the draft convention should permit the untrammelled enforceability of arbitration agreements in contracts of carriage. It was stated that arbitration was an extremely popular form of dispute resolution throughout the world for disputes regarding contracts of carriage. Scepticism was expressed regarding whether it was necessary to safeguard the jurisdiction regime set out in the draft convention by reducing the freedom to arbitrate in the liner industry, which had never made broad use of arbitration, and, it was suggested, was unlikely to do so to thwart jurisdiction. In addition, caution was raised with respect to the possibility of over-regulating arbitration, thus affecting its effectiveness.

Arbitration provisions in the Hamburg Rules

89. The view was also expressed that the Working Group should consider the adoption of arbitration rules similar to those found in article 22 of the Hamburg Rules, and already included for consideration in the arbitration chapter in A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.56. One advantage of those rules was said to be that they were already the product of a compromise that took place during their negotiation. There was some support for this view. However, one difficulty with the approach in the Hamburg Rules was said to be that they reduced commercial certainty by allowing the arbitration to take place in one of a number of different possible locations. An advantage of the proposal in A/CN.9/WG.III/WP.54 was thought to be that it allowed for the resolution of the dispute either through arbitration at the specific location cited in the arbitration provision, or in a court in a location designated pursuant to draft article 75. However, it was also observed that the variety of potential locations for arbitration could be seen as an advantage of the Hamburg Rules in terms of promoting the development of arbitration by providing for it in different locations, but with reference to the same set of rules.

The compromise proposal in A/CN.9/WG.III/WP.54

90. A number of delegations made clear that their starting position when arbitration had first been discussed during the fourteenth session of the Working Group had been in favour of unqualified freedom to arbitrate. However, these delegations had, in the spirit of compromise, come to support the proposal in A/CN.9/WG.III/WP.54, particularly due to its deference to the existing international arbitration regime, and to its maintenance of the status quo in regard to arbitration practices in the maritime transport industry. Some reservations were raised regarding whether the compromise proposal might in fact limit the development of arbitration in the liner trade, since commercial enterprises would not be likely to include an arbitration provision in a contract unless they could be certain of where

the arbitration would take place, and that might not be possible if that choice were subject to the draft article 75 list. Ultimately, while a number of delegations suggested that further refinements in the drafting of the proposal were necessary, not the least in the face of the new provisions considered for the jurisdiction chapter, there was support for the proposal as a compromise intended to further the efforts of the Working Group and as a basis for future discussions.

Clarifications of the intended effect of the compromise proposal

91. A question was raised with respect to the interaction of draft sub-paragraphs 78 (2)(a) and (b), and whether the claimant should be required to provide a short time period in which the carrier would have to decide whether to transfer the proceedings from the place in the arbitration clause to a place designated by draft article 75. In response to a question regarding which parties could be asserting a claim against the carrier under draft article 78 (2)(a), it was suggested that this and other answers might best be addressed during the Working Group's consideration of the chapter on rights of suit, and perhaps the chapter on time for suit, both anticipated at its next session.

Suggested modifications to the compromise proposal

92. In addition to general adjustments to the proposal made necessary in light of changes under consideration for the jurisdiction provisions in the draft instrument, certain specific modifications to the proposal were suggested. In light of the thrust of the discussions in the Working Group with respect to jurisdiction and choice of court clauses under draft article 76, the view was expressed that exclusive arbitration clauses should be permissible and should be enforced on the same grounds as exclusive choice of court clauses. There was some support for the suggestion that the effect of an arbitration agreement on third parties to the contract of carriage should be made clear and should be harmonized, rather than being left to national law as in draft article 81 bis. A model for this approach was suggested to be draft article 83 of the draft convention. In response, concern was raised that creating rules regarding third parties could amount to impinging on the domain of the New York Convention regarding the enforceability of arbitration agreements. In addition, there was some support for the inclusion of a provision along the lines of draft article 85 of the current chapter on arbitration requiring an arbitrator to apply the rules of the draft convention. It was suggested in response that such a rule was unnecessary, since an arbitrator would look to the contract of carriage to decide which rules to apply, and that inquiry would either lead the arbitrator to the draft convention or it would not.

93. Some specific drafting changes were suggested to the text. There was support for the view that the word "solely" in proposed draft article 81 bis should be placed in square brackets or be eliminated. A suggestion was also made that the bracketed text "[a jurisdiction or]" should be deleted in its entirety from draft article 81 bis, since jurisdiction clauses were not common in the non-liner industry, and the intention of the proposal was to preserve the status quo. Other views were expressed in favour of keeping the text and deleting only the square brackets. Support was expressed for the following alternate text intended to replace and clarify draft paragraph 78 (2)(b):

"The carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if the person asserting the claim against a carrier institutes court proceedings in a place specified in the arbitration agreement."

Conclusions reached by the Working Group regarding provisions on arbitration:

94. After discussion, the Working Group decided that:

- There was broad consensus for the compromise proposal presented in A/CN.9/WG.III/WP.54; and
- The proposal should form the basis for future work following modification in light of the discussion in the Working Group as noted above, and with respect to the anticipated revision of draft article 76 on jurisdiction.

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

"Article 83. Arbitration agreements

"Subject to article 85, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

"(a) The person asserting a claim against the carrier has the option of either:

"(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or

"(ii) instituting court proceedings in any other place, provided such place is specified in article 75 (a), (b) or (c);

"(b) If a person asserts a claim against a carrier, then the carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if that person institutes court proceedings in

"(i) a place specified in the arbitration agreement, or

"(ii) a court that would give effect under article 76 to an exclusive choice of court agreement specifying the place named in the arbitration agreement that is exclusive with respect to the action against the carrier.

"Article 84. Arbitration agreement in non-liner transportation

"Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply by reason of:

"(a) the application of article 10,[4] or

"(b) the parties' voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.

"Article 85. Agreements for arbitration after the dispute has arisen

"Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place."

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83 (b)(ii); by deleting the word "solely" in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase "[a jurisdiction or]" in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5 (c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase "[a jurisdiction or]".

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

New draft subparagraph 83 (b)(ii)

99. It was indicated that there was a parallelism between exclusive choice of court agreements, on the one hand, and arbitration agreements, on the other hand, and that therefore the two should be accorded similar treatment in the draft convention with respect to freedom of contract. Accordingly, it was indicated that the goal of the draft subparagraph 83 (b)(ii) was to allow for arbitration agreements in those cases where an exclusive jurisdiction clause would be recognized under draft article 76 of the draft convention, relating to the recognition of exclusive choice of court clauses.

[4] The reference might be modified depending on the future revision of draft article 10 of the draft convention.

It was observed that the effect of draft subparagraph 83 (b)(ii) would be a further expansion of freedom of arbitration in the liner industry. Upon request for clarification, it was explained that draft subparagraph 83 (b)(ii) required the existence of an arbitration agreement for its operation, and, in response, it was suggested that the text should be amended to specifically indicate so. It was further observed that draft subparagraph 83 (b)(ii) applied only to claims against the carrier, while claims brought by the carrier were outside its scope.

100. Some hesitation was expressed regarding draft subparagraph 83 (b)(ii), however, in light of another view that exclusive choice of court clauses and arbitration agreements had different natures and consequences, and that their treatment under the draft convention should reflect such differences. In particular, the link with draft article 76 was seen to be problematic in that it linked arbitration agreements with a State's decision whether or not to enforce exclusive choice of court agreements. An additional concern was expressed that draft subparagraph 83 (b)(ii) might deprive the shipper of a reasonable place to protect its interests, especially in light of the higher costs of arbitration compared to court litigation. It was therefore suggested that subparagraph 83 (b)(ii) should be deleted.

New York Convention and draft subparagraph 83

101. It was indicated that the effect of draft subparagraph 83 would be to allow courts, under certain conditions, to declare that, despite an arbitration agreement entered into in good faith, the arbitration agreement would not be binding on the parties. It was added that such outcome was not only unusual in modern trade law, but also contrary to basic arbitration principles as contained in a number of widely accepted texts such as the New York Convention, and in particular its article II (3), and the UNCITRAL Arbitration Model Law. It was added that, while the principle of respect of the arbitration agreement might tolerate certain deviations, such as in article 22 (3) of the Hamburg Rules, these could not extend to preventing access to arbitration as envisaged under new draft article 83 without fundamentally affecting that principle. It was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (on arbitration) on the provisions of the draft convention relating to arbitration.

102. In response, it was indicated that for a number of reasons, the proposed text was not inconsistent with the New York Convention. It was further explained that the basic principle of the New York Convention did not require general recognition of all arbitration agreements, but only non-discrimination of arbitration agreements vis-à-vis jurisdiction clauses. It was added that, since arbitration agreements were allowed in the draft proposal exactly in the same cases where exclusive jurisdiction clauses would be recognized, that basic principle of the New York Convention was not affected by the proposed text. Furthermore, it was indicated that a restriction on the effectiveness of arbitration agreements was a consequence of maritime trade practice, which saw restrictions of freedom of arbitration in certain circumstances and trades.

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83 (b)(ii) of the draft convention should be placed in square brackets pending its next reading.

Obligations of the shipper—Chapter 8

General discussion

104. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations during its thirteenth session (see A/CN.9/552, paras. 118 to 161).

105. It was observed that this chapter on the obligations of the shipper represented a break from previous practice in the field of maritime transport, since other international maritime instruments did not have such extensive provisions relating to shippers' obligations. It was noted that the Hague-Visby Rules had only one provision relating to shippers' liability (art. 4 (3)), while the Hamburg Rules had two such rules (arts. 12 and 13). Some transport conventions did have similar provisions, such as the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (the CMNI Convention), but it was observed that the draft convention created a new and, some suggested, onerous liability regime for shippers.

106. Some doubt was expressed as to whether the chapter was in fact needed at all. The view was expressed that the chapter placed a heavy responsibility on shippers, and it was suggested that small shippers, particularly those from developing countries, could find it difficult to meet the requirements of the draft convention. Concern was also expressed with respect to the provisions of the chapter regarding the shipper's burden of proof and the basis of the shipper's liability, which are discussed in further detail in paragraphs 136 to 153 below.

107. There was general support expressed for including the chapter on shippers' obligations in the draft convention as it reflected the current context in which the contract of carriage required the shipper and carrier to cooperate to prevent loss of or damage to the goods or to the vessel. The view was expressed that obligations in the contract of carriage had evolved over the years beyond mere acceptance to carry goods and payment for such carriage. It was said that this cooperation between the shipper and the carrier should be reflected in the draft convention.

108. Although support was expressed for the inclusion of a chapter on shippers' obligations in the draft instrument, it was suggested that the current draft articles contained in the chapter went too far beyond the scope of the relationship in the contract of carriage. As such, it was felt that aspects of the provisions that went

beyond the contractual relationship and related to third parties, such as consignees, should be removed from this chapter. Against this background, it was noted that there was a need to strike an overall balance in the draft convention between obligations of the shipper and the carrier, and the view was expressed that it was not inappropriate for the draft convention to contain obligations on shippers. However, caution was expressed that unnecessarily detailed shippers' obligations could result in creating hurdles for the ratification of the draft convention. Significant support was however expressed for including the chapter in the draft convention in view of the current trends already alluded to in the paragraph above.

Draft article 28. Delivery for carriage

General discussion

109. The Working Group was reminded that it had last considered draft article 28 at its thirteenth session (see A/CN.9/552, paras. 118 to 125). The Working Group considered the text of draft article 28 as contained in annexes I and II of document A/CN.9/WG.III/WP.56.

First sentence

110. General support was expressed for the text of the first sentence. In addition, it was proposed and generally agreed that the words "unless otherwise agreed" in the middle of the first sentence be moved to the beginning of the sentence. This was because if left in the middle of the sentence, the reading of the sentence would suggest that readiness of the goods for carriage was not something that the parties could agree on, and there could be cases where the shipper and the carrier agreed to carry goods that were not ready for carriage due to insufficient time. In response to concerns raised, there was support for the view that moving the words to the beginning of the sentence was not seen to mean that parties could agree to contract out of securely and safely packing or stowing the goods, as those obligations would be subject to other provisions, as for example, with respect to dangerous goods. A contrary view was expressed, however, that the shipper should not be able to contract out of the obligations placed on it by the first sentence of the draft article.

Second sentence

111. There was some support for the view that the second sentence could be deleted altogether as it was superfluous and did not add anything not already covered by the first sentence. Its retention, it was thought, would only add ambiguity and interpretation problems to the draft article as a whole.

112. There was strong support for the view that the second sentence should be retained as having at least practical value in reminding the shipper of the importance of stowing and securing the goods to withstand the voyage. It was noted that the incidence of damage and injury as a result of poorly secured cargo was growing and there was need to emphasize the importance of properly securing goods to withstand the intended carriage.

113. Notwithstanding its decision to retain it, the Working Group heard that the second sentence was too detailed and too repetitive, and a suggestion was made for the second sentence to be simplified and essential aspects of it incorporated into the first sentence. There was support for the alternative view that the second sentence

should be replaced by the text set out in footnotes 116 and 435 of A/CN.9/WG.III/WP.56.

114. A drafting suggestion was made that the shipper should have freedom to contract out of the obligation in the second sentence, and that the second sentence should also begin with the words "unless otherwise agreed in the contact of carriage". Contrary views were expressed, including the suggestion that the second sentence should begin with the words "without prejudice to the foregoing" in order to clearly indicate its relationship with the first sentence.

115. Other drafting suggestions made were that the second sentence should become a separate paragraph because when translated into some other languages, the phrase "unless otherwise agreed in the contract of carriage" would relate to both the first and the second sentences. It was observed that the words "container" and "trailer" used in the second sentence, could be harmonized with text used elsewhere in the draft convention, such as in draft article 64 (3), which referred to "articles of transport".

Drafting suggestions for draft article as a whole

116. A number of general drafting suggestions were made with respect to the text of the draft article as a whole. There was support for the suggestion to revise the title of the chapter to better reflect its scope by indicating that it contained "Obligations of the shipper to the carrier". It was also suggested that the text of the draft article itself should make clear to whom the shipper was liable, particularly in light of the possible breadth of the provisions in chapter 14 on rights of suit under the draft convention.

117. There was general support for the observation that the words "intended carriage" in both sentences was understood to cover all legs of the carriage. To clarify this understanding a suggestion was made that text such as "all transport legs of" be inserted before the words "the intended carriage" in both sentences.

118. Additional suggestions were that simpler language, such as "loading" and "unloading" could be used in both sentences instead of the listed obligations involved in stowing and securing the goods. It was also felt that listing these methods might be misleading if one method was left out, and as an alternative, it was suggested that the words "ready for carriage" could be used to replace the list. The list was also said to create redundancy and overlap of some terms when translated to other languages.

Use of the word "injury"

119. The view was expressed that the use of the word "injury" in the draft article was inappropriate since it could be seen to extend the scope of the provision outside of the contract of carriage between the shipper and carrier to third parties. It was felt that the word "injury" should be replaced with the word "loss", in order to convey the intention that where, for example, goods improperly packed by a shipper caused injury to an employee of a carrier, the carrier would be entitled to seek compensation from the shipper for the loss suffered in compensating the employee. The view was also expressed that the word "loss" should replace the entire phrase "injury or damage" in the draft article. However another view was that while the provision should not establish any independent liability of the shipper for injury to a

third party, but that the use of the term should be readdressed after the Working Group had considered draft article 31 on the basis of the shipper's liability. Another drafting suggestion to limit the application of this provision to the parties to the contract of carriage was to add the words "for which the carrier is liable" at the end of the phrase "injury or damage".

Conclusions reached by the Working Group regarding draft article 28

120. After discussion, the Working Group decided that:

- The title of the chapter should make reference to the shipper's obligations to the carrier;
- Moving the phrase "unless otherwise agreed" should be one of the modifications to the text of the first sentence considered by the Secretariat in addition to other modifications suggested in the course of discussion;
- The second sentence should be retained, but its text should be simplified by the Secretariat, taking into account the text in footnotes 116 and 435 of A/CN.9/WG.III/WP.56, as well as the comments and suggestions made during the course of discussion in the Working Group; and
- The use of the term "injury" should be clarified, possibly placed in square brackets as alternative text, and reconsidered by the Secretariat in a future draft in light of the Working Group's consideration of draft article 31.

Draft article 29. Carrier's obligation to provide information and instructions

General discussion

121. The Working Group was reminded that it had last considered draft article 29 at its thirteenth session (see A/CN.9/552, paras. 124 to 129).

122. It was observed that this provision reflected the duty of cooperation between the parties with respect to the exchange of information necessary for the performance of the contact of carriage. Reference was also made in this respect to the principle of good faith in contractual relations. Differing views were expressed regarding whether draft article 29 was intended to define the carrier's duty to assist the shipper with its draft article 30 obligation to provide information, instructions and documents to the carrier, or with its draft article 28 obligation to deliver the goods ready for carriage. There was support for the view that the purpose of draft article 29 was not to establish independent liability of the carrier for its failure to provide the shipper with necessary information, but rather to deny the carrier the ability to rely on its failure in defending a cargo claim.

123. There was support for the view that draft article 29 should be deleted. It was suggested that the obligations of the carrier contained therein were already covered, at least implicitly, in draft chapter 7 on the obligations of the carrier. The view was also expressed that draft article 29 was too broad and too subjective to be of any additional benefit to the existing implied obligation of the carrier. There was support for the suggestion that draft article 29 should be substituted by a general provision on the duty of the parties to cooperate in the exchange of information in furtherance of the performance of the contract of carriage. In addition to deleting draft

article 29, it was suggested that draft article 18 setting out the carrier's liability for loss or damage resulting from its breach of draft article 29 should also be deleted.

124. However, the contrary view was also held that draft article 29 should be retained. There was support for the view that this provision could be particularly important in multimodal transport if the carrier was not required to choose the modes of transport prior to performance of the contract of carriage, yet where those modes could affect the shipper's fulfilment of its draft article 28 obligations to deliver the goods ready for carriage. In response to this, it was noted that the carrier might not actually know in advance which modes of transport it would use. In additional support of retaining draft article 29, it was suggested that it was useful to make explicit the obligations of the carrier and that the provision could also be seen to balance the parties' obligations with respect to the provision of information. In this regard, a view was expressed that the words "on its request" should be deleted from draft article 29, since there was no similar qualification to the shipper's obligation to provide information in draft article 30.

125. The suggestion was made that the Working Group's decision on draft article 29 should be deferred until after the discussion of the basis of the shipper's liability in draft article 31 to fully appreciate the interplay of the two provisions.

126. By way of specific drafting suggestions, the view was expressed that the bracketed phrase "and in a timely manner" and the last bracketed sentence of draft article 29 should be deleted, since the obligation to provide accurate and complete information and instructions in a timely manner was said to be implicit in the general obligation under draft article 29. Further, it was suggested that the retention of the last bracketed sentence of draft article 29 requiring accuracy and completeness would require the adoption of the same language in similar provisions requiring the provision of information, such as, for example, draft article 59. The contrary view was expressed that the phrase "in a timely manner" should be retained and the brackets around it deleted, since, it was suggested, the obligation of timeliness was separate and not implicit in the general obligation to provide information.

Conclusions reached by the Working Group regarding draft article 29:

127. After discussion, the Working Group decided that:

- Draft article 29 should be retained, but placed in square brackets pending the Working Group's discussion on draft article 31;
- In preparing a revised version of draft article 29, consideration should be given to deleting the existing text in favour of a more general provision focussing on the cooperation of the shipper and carrier in the provision of information; and
- Revisions made to the text of draft article 29 should take into account draft article 18.

Draft article 30. Shipper's obligation to provide information, instructions and documents

General discussion

128. The Working Group was reminded that it had last considered draft article 30 at its thirteenth session (see A/CN.9/552, paras. 130 to 137).

129. It was observed that this provision was thought to be especially important in light of the contemporary transport practice, in which a carrier seldom saw the goods it was transporting, even when they are non-containerized goods. In this context, the flow of reliable information between the shipper and the carrier was said to be of utmost importance for the successful completion of a contract of carriage, particularly with respect to dangerous goods. It was said that while there were some drafting problems in paragraph (b) that required attention, the Working Group should be encouraged in the course of it deliberations to bear in mind the importance of the shippers' obligations set out in this provision. As a preliminary observation, it was suggested that the phrase in the chapeau "[in a timely manner, such accurate and complete]" should be dealt with in the same fashion as similar text found in draft article 29.

Objective and subjective tests

130. It was indicated that the words "reasonably necessary for" in the chapeau of draft article 30 introduced an objective test on the necessity of the information to be provided by the shipper, while the words "may reasonably assume" in paragraphs (a) and (c) of draft article 30 represented a subjective test of the shipper's assumption regarding the carrier's knowledge. It was suggested that the presence of both tests could be a source of some confusion. In addition, it was observed that if paragraphs (a) or (c) were ultimately subject to a fault-based liability scheme pursuant to draft article 31, there would be no need of the phrase "reasonably assume", and it could be deleted.

Paragraph (b)

131. The view was expressed that the current text of draft paragraph 30 (b) was extremely broad and could lead to problems in its application, particularly since it could subject the shipper to strict liability pursuant to article 31. One example of the difficulty posed by this article was, for instance with regard to responsibility for the different customs requirements in the event that the mode of transport changed en route during multimodal transport.

132. In response, it was indicated that the broad language of draft paragraph 30 (b) reflected the difficulties in providing a complete and detailed list of all the documents necessary in connection with the carriage. It was suggested that the adoption of a fault-based liability regime for this obligation could address a number of concerns relating to this provision, and that a strict liability regime could be limited to the violation of mandatory regulations.

Delay

133. It was observed that the inclusion in draft article 31 of a bracketed reference to delay as a basis of liability of the shipper compounded the difficulties noted with

respect to draft paragraph (b). For example, if the shipper of a single container on a large container ship failed to provide a necessary document for customs authorities under paragraph (b), and was therefore responsible for the delay not just of the carrier, but with respect to every other shipper on the vessel, that shipper would be exposed to unforeseeable and potentially enormous losses for that one oversight. Further compounding the problem was said to be the fact that the draft convention currently contained no limitation on the shipper's liability. This problem was discussed in greater detail with respect to draft article 31 (see below, para. 147).

Paragraph (c)

134. It was suggested that draft paragraph 30 (c) should include a reference to draft subparagraph 38 (1)(a), and thereby include the accuracy of the description of the goods in the list of obligations for which the shipper was strictly liable pursuant to draft article 31. However, the Working Group was reminded that article 3 (5) of the Hague-Visby Rules referred only to accuracy of the description of the goods at the time of the shipment, but that draft paragraph (c) was much broader in its scope and would apply for the duration of the voyage. It was cautioned that, like draft paragraph (b), when the breadth of this provision was coupled with the potential strict liability provision in draft article 31, this provision could bring potentially severe consequences for the shipper. It was noted that, if variant B of draft paragraph 31 (2) were adopted, the liability of the shipper would be limited to the information on the goods actually provided by the shipper and that this would relieve the shipper from some of the harsher aspects of the strict liability regime under variant A.

Conclusions reached by the Working Group regarding draft article 30

135. After discussion, the Working Group decided that:

- The phrase in the chapeau "[in a timely manner, such accurate and complete]" should be considered in the same fashion as similar text in draft article 29;
- Paragraph (b) should be placed in square brackets, pending the Working Group's consideration of draft article 31;
- Drafting improvements made to this draft article should bear in mind A/CN.9/WG.III/WP.55, as well as international instruments such as the CMNI Convention and suggestions made by delegations;
- The discussion of the Working Group with respect to the basis of the shipper's liability in draft article 31 should be taken into consideration in future drafts of draft article 30; and
- The reference to draft article 38 (1)(b) and (c) in draft paragraph 30 (c) should be extended to draft article 38 (1)(a).

Draft article 31. Basis of shipper's liability

General discussion

136. The Working Group was reminded that it had last considered draft article 31 on the basis of the shipper's liability at its thirteenth session (see A/CN.9/552,

paras. 138 to 148). The text of draft article 31 considered by the Working Group was that set out in annexes I and II of A/CN.9/WG.III/WP.56.

137. There was agreement with the general observation that draft article 31 was of particular concern with respect to the inclusion of more extensive shipper's obligations in a chapter of the draft convention in comparison with existing maritime transport regimes. It was thought that the introduction in this provision of a fairly extensive strict liability regime on the shipper, without any right to limit its liability, was quite problematic, as was the introduction of a presumed fault concept in paragraph 1. There was support for the suggestion that the general approach of draft article 31 should be more in keeping with that of article 12 of the Hamburg Rules, with some possible adjustments.

Presumed fault and the burden of proof

138. Concerns were raised regarding the inclusion in draft paragraph 1 of the concept of presumed fault on the part of the shipper. It was observed that presumed fault amounted to a reversal of the burden of proof onto the shipper that had no parallel in existing maritime transport regimes. Generally, the carrier had the burden of proving that the loss or damage was caused by a breach of obligation or negligence of the shipper, such as a failure to provide necessary information. Once the carrier had proved the cause of the loss or damage, it was open to the shipper to prove that the loss or damage did not arise as a result of its fault. This general regime was thought to reflect the fact that the carrier was usually in a better position to establish what had occurred during the carriage, since it was in possession of the goods. There was general support for the view that the traditional approach to fault-based liability as set out in article 12 of the Hamburg Rules and article 4 (3) of the Hague-Visby Rules should be preserved as the general regime, with strict liability only in certain situations, as discussed below.

139. There was some support for the alternate view that the text in paragraph 1 was appropriate and that the approach taken in the Hamburg Rules was not necessarily fair to the carrier, since most containers in modern transport were packed by shippers, thus making it difficult for the carrier to prove the cause of the loss. It was also pointed out that article 12 of the Hamburg Rules did not set out the burden of proof, and that draft article 31 merely made explicit the logical conclusion that a court would reach that the shipper in defending a claim for loss arising from draft articles 28 and 30 (a) would seek to prove its lack of fault.

Shipper's liability to whom

140. There was general agreement that the basis of liability of the shipper should apply only in the context of the contractual relationship between the carrier and shipper, possibly also extending to maritime performing parties who could be said to be sufficiently proximate to the contractual relationship. It was suggested that the title and text of the article should make clear that this provision was confined to the shipper's liability to the carrier, and that draft article 31 (3) referring to liability to a consignee or a controlling party should be deleted, and its contents treated elsewhere in the draft convention.

Loss, damage or injury

141. There was support for the suggestion that "injury" should be deleted from draft paragraph 31 (1), again in order to clarify that it did not intend to create a claim for third parties, as discussed earlier with respect to the inclusion of "injury" in draft article 28 (see above, paragraphs [...]). It was further suggested that "damage" should also be deleted and that reference should be made only to "loss" in draft paragraph 1. The proposal for the deletion of "injury" met with approval in the Working Group. There was support for the suggestion that despite this deletion, the draft convention should ensure that if a carrier paid out a claim as a result of injury caused by negligence of the shipper, the carrier should be able to claim compensation from the shipper as a loss suffered by the carrier. It was suggested that this could be achieved by referring to "loss sustained by the carrier" in draft paragraph 1. The Working Group was reminded that care should be taken regarding the use of the term "loss" on its own, as it could include not only physical loss, but consequential loss as well.

142. It was observed that article 12 of the Hamburg Rules included damage sustained by the ship in the shipper's liability. The question was raised whether damage occasioned to the ship should also be included in draft article 31, and the view was expressed that "loss" included damage to the ship. It was observed that the shipper's liability could become very broad in such cases.

Delay

143. There was support for the view that "delay" was particularly problematic as a basis for the shipper's liability, since it could expose the shipper to enormous and potentially uninsurable liability. For example, a shipper who failed to provide a necessary customs document could cause the ship to be delayed, and could be liable not only for the loss payable to the carrier, which could include enormous consequential damages, but also for the losses of all of the other shippers with containers on the ship. As a consequence, the suggestion was made that the shipper's liability for "delay" should be deleted from the draft text. It was also observed that if "delay" was retained in the text, a reasonable limitation should be placed on the liability of the shipper.

144. A contrary view regarding deletion of "delay" was also expressed. It was stated that the liability of the shipper and of the carrier for delay was an important aspect of the draft convention. It was observed that deleting "delay" called into question the rationale for creating strict liability for submitting incorrect information, since inaccurate information was the most common cause for delay.

145. There was some support for the view that, while problematic, delay should not too easily be discarded as a basis of liability, and it was suggested that it could be considered as a separate basis of liability, whether caused by the shipper or the carrier. It was noted that loss due to delay could not only be enormous, as noted above, but that it could have multiple causes.

146. The Working Group was reminded that the basis of liability of the carrier in the draft convention also included "delay", and it was suggested that if delay was removed as a basis for the shipper's liability, a corresponding change should be made to the carrier's liability. It was explained that this was not simply a matter of balancing the overall rights and obligations of the shipper and the carrier in the draft

convention, but that it would not be fair to hold the carrier liable for a delay for which it might not be responsible, and for which it could not claim compensation from the shipper who was responsible. There was support for that view.

Limitation of liability

147. There was some support for the suggestion that a limit should be placed on the shipper's liability, if "delay" was retained as a basis for the shipper's liability in draft article 31, given the large and potentially uninsurable liability that could be covered. The suggestion was also made that such a limitation on the liability of the shipper for consequential losses should exist in any event, as, for example, the shipper could be held responsible for broad, but likely insurable, liability for damage to the ship. However, the difficulties associated with arriving at a reasonable means of determining such a limitation on liability were also outlined. There was general agreement that such a limitation should be at a high enough level so as to provide a strong enough incentive for the shipper to provide accurate information to the carrier, but that it should be foreseeable and low enough so that the potential liability would be insurable. It was suggested that the language of article 31 (2) variant B, i.e. "the shipper must indemnify the carrier against", or reference to the value of the shipper's goods, could be useful starting points for further discussion in this regard.

Strict liability

148. The Working Group next considered which of the shipper's obligations should be subject to a strict liability regime such as that set out in draft paragraph 31 (2). There was general support for the view that the shipper should be held strictly liable for the accuracy of information provided by the shipper to the carrier under article 30 (c) unless the inaccuracy was caused by the carrier. It was also suggested that a separate provision could be created for such a strict liability obligation, along the lines of the special treatment given to dangerous goods in draft article 33. There was support for the creation of such a separate provision, as it was said that it would clarify the structure of the chapter and allow for the deletion of draft paragraphs 30 (c) and 31 (2). Further, there was some support for the view that strict liability should be limited to the accuracy of the information actually provided by the shipper for insertion in the transport documents. It was further observed that strict liability should not extend to misjudgement of the shipper of the necessity of the information required, and that the inclusion of draft paragraph 30 (b) in the strict liability regime would depend upon the texts following their reformulation.

149. There was support for the view that if separate provisions were created for liability of the shipper based on fault and liability based on strict liability, there would be less need for a provision such as draft article 29, and the Working Group could consider deleting it. However, the view was also expressed that it might nonetheless be preferable to include an explicit obligation for the carrier to provide necessary information on the intended voyage to the shipper, so as to enable the shipper to fulfil its draft article 28 obligations.

150. It was also suggested that in addition to the provision of inaccurate information to the carrier and with respect to dangerous goods, there was a third category of obligations for which there should be strict liability on the part of the shipper. That third category was said to be security-related, and should apply to

those goods that are prohibited due to their potential relationship with weapons of mass destruction or similar uses. It was said that in these situations, the carrier could be subject to major losses and penalties as a result of the shipper's breach, and that the shipper's liability in these circumstances should be strict. Some interest was expressed in this proposal, but the contrary view was also expressed that strict liability should not apply to carriage of extremely dangerous goods, military or similar goods.

Draft paragraph 31 (3)

151. A proposal was made to keep the text of draft paragraph 3 but to add the following to the end of the final sentence: "to the extent that each of them is responsible for any such loss or damage. Where the extent of individual fault cannot be attributed, each party shall be liable for one-half of the loss or damage". However, there was strong support for the view that paragraph 3 should be deleted in light of the agreement in the Working Group that draft article 31 should focus on the contractual relationship between the shipper and the carrier, and that a draft article on concurring causes should be included elsewhere in the draft convention to deal with the allocation of liability between the carrier and the shipper in cases where several causes had combined to produce the loss.

General drafting suggestions

152. In terms of preparing revised text to replace draft article 31, it was suggested that reference should be had to the texts appearing in paragraph 26 of A/CN.9/WG.III/WP.55 and draft paragraph 31 (1) and variant B of paragraph (2) of A/CN.9/WG.III/WP.56, in addition to the approach in article 12 of the Hamburg Rules and in general, to article 4 (3) of the Hague-Visby Rules. More specific suggestions were also made, such as deletion of the reference to "timeliness" and "completeness" in variant B of paragraph 2, in order to render the provision more in keeping with the approach set out in the Hague-Visby and Hamburg Rules. Another drafting suggestion to remedy some of the problems in the first paragraph was proposed as follows: "The shipper is liable for loss or damage resulting from the breach of its obligations under article 28 and article 30 (a) unless ..." followed by the rest of draft paragraph 1 continuing from the word "unless", but it was suggested that this text might still preserve the reversed burden of proof onto the shipper.

Conclusions reached by the Working Group regarding draft article 31

153. After discussion the Working Group decided that:

- The title and text of draft article 31 should be adjusted to reflect that it concerned the relationships in the contract of carriage;
- A fault-based regime should be adopted as the general regime for the basis of a shipper's liability for breach of its obligations under draft articles 28 and 30;
- Strict liability should be the basis of shipper's liability in respect of dangerous goods under draft article 33 (see below) and for providing inaccurate information under article 30 (c);

- The new formulation of draft article 31 should take into account the texts in A/CN.9/WG.III/WP.56 and in paragraph 26 of A/CN.9/WG.III/WP.55, as well as the regime in the Hamburg Rules, and the views of the Working Group as expressed above;
- The word "injury" should be deleted from the new formulation of draft article 31 (1);
- In preparing the new formulation of draft article 31, regard should be had to the views expressed regarding the deletion of delay as a basis of liability of both the shipper and the carrier, and for the possibility of creation a limitation on the shipper's liability; and
- The reformulation of draft article 31 should take into account the discussion of the Working Group regarding draft article 29, and make the necessary adjustments to achieve consistency, including possible deletion or revision of draft article 29.

Draft article 32. Material misstatement by shipper

General discussion

154. The Working Group was reminded that it had last considered draft article 32 at its thirteenth session (see A/CN.9/552, paras. 149 to 153).

155. It was indicated that draft article 32 relating to knowing and material misstatement by the shipper regarding the nature or value of the goods was inspired by article 4 (5)(h) of the Hague-Visby Rules. It was observed that the provision was seen to be problematic, since no causation was required between the shipper's misstatement and the loss, damage or delay. Further, it was thought that the obligation in this draft provision was already sufficiently covered by draft article 17 on the carrier's liability. A contrary view was expressed that draft paragraph 17 (3) related to cases of acts of omissions, but not material misstatements, and that draft article 32 was helpful in that regard.

Conclusions reached by the Working Group regarding draft article 32:

156. After discussion, the Working Group decided that:

- Draft article 32 should be deleted from the text of the draft convention.

Draft article 33. Special rules on dangerous goods

General discussion

157. The Working Group was reminded that it had last considered draft article 29 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

Paragraph 1

Definition of dangerous goods

158. There was support for the view that, while existing maritime transport instruments did not contain a definition of dangerous goods, the general definition expressed in draft paragraph 1 was an appropriate starting point for discussion. Another view was expressed that the definition should instead refer to other existing

international instruments relating to dangerous goods, such as the International Maritime Dangerous Goods Code (IMDG Code) or the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). It was observed that the problem with tying the definition of dangerous goods to other instruments such as those suggested was that those definitions were created for public interest purposes and they were extremely technical and could risk becoming quickly obsolete. It was suggested that a definition of dangerous goods should also clarify if illegal cargo, such as contraband, would fall under this category.

"or become" and "reasonably appear likely to become"

159. It was suggested that draft paragraph 33 (1) did not adequately address the case of goods that were safe at the moment of shipment and later developed dangerous properties, and it was suggested that the words ", or become" should be added before the words "or reasonably appear likely to become," to provide for such instances. However, concern was expressed regarding how that addition might affect the shipper's marking, labelling and information obligations as set out in draft paragraphs 2 and 3. Further, a suggestion to delete the phrase "reasonably appear likely to become" was not supported, as the phrase was seen to be helpful to the overall definition.

"illegal or unacceptable danger to the environment"

160. There was support for the proposal that the words "or an illegal or unacceptable danger" should be deleted from draft paragraph 33 (1) since they failed to add meaning to the term "danger to the environment". It was also observed that the same changes should be made to similar text in variant A of draft article 15.

Conclusions reached by the Working Group regarding draft paragraph 33 (1):

161. After discussion, the Working Group decided that:

- The words ", or become" should be added in square brackets before the words "or reasonably appear likely to become," for further consideration by the Working Group; and
- The words "or an illegal or unacceptable danger" should be deleted.

Paragraph 2

162. It was indicated that draft paragraph 33 (2) established strict liability with respect to the shipper's obligation to mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities applicable during any stage of the intended carriage of the goods. The view was expressed that given the harsh burden of strict liability, this provision should be refined to cover only those cases in which the shipper failed to comply with mandatory regulations regarding marking or labelling. It was also proposed that packaging should be added to the shipper's obligations referred to in this draft paragraph. Further, it was suggested that draft paragraph 33 (2) should not impose strict liability on the shipper when the carrier was aware of the dangerous nature of the goods. There was support for the proposal that appropriate language inspired by article 13 (3) of the

Hamburg Rules should be inserted in draft paragraph 33 (2) to refer to the carrier's lack of knowledge.

The intended carriage

163. It was further indicated that, like draft articles 28 and 29 (see above, para. 124), the provision could place an excessive burden on the shipper, who might not be aware of the actual route of the goods, and might have difficulty determining all of the relevant regulations, particularly the "requirements of authorities", which might not be publicly available. It was suggested that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its paragraph 2 obligations.

Proposed modifications to the text

164. The view was expressed that article 13 (1) of the Hamburg Rules could provide an alternative text for the draft provision, but some doubts were raised whether the text was adequate in the modern context of the transport of dangerous goods.

165. There was support for the suggestion that the reference to the performing party should be deleted given the Working Group's agreement that draft chapter 8 of the draft convention should focus on the contractual relationship between the shipper and the carrier. Support was also expressed for the suggestion that the references to "delay" and "loss" in draft paragraph 2 should be adjusted to be consistent with the modification of the same phrase in draft article 31. It was suggested that the words "directly or indirectly" could interfere with issues of causation, and should be deleted. There was support for this proposal.

Conclusions reached by the Working Group regarding draft paragraph 33 (2):

166. After discussion, the Working Group decided that:

- The reference to the performing parties should be eliminated from the provision;
- The words "directly or indirectly" should be deleted;
- The provision should be revised so as to treat "delay" and "loss" consistently in draft articles 33 (2) and 31; and
- Consideration should be given to adding a reference to the carrier's lack of knowledge of the dangerous nature of the goods.

Paragraph 3

Strict liability to inform the carrier

167. It was indicated that draft paragraph 33 (3) established strict liability for the shipper's obligation to inform the carrier of the dangerous nature or character of the goods in a timely manner before their delivery to the carrier. With respect to draft paragraph 2, it was suggested that given the harsh nature of the strict liability rules, this obligation should be limited to the shipper's failure to comply with mandatory regulations.

"such shipment"

168. It was indicated that the shipper's obligation set out in draft paragraph 33 (3) was similar to the one set out in article 13 (2)(a) of the Hamburg Rules. It was suggested that the phrase "such shipment" should be replaced with the phrase "such failure to inform", since it was thought that the possible breadth of the strict liability was too wide if it was tied to all losses arising from the shipment, and not limited to those attributable to the failure to inform. However, it was clarified that the Hamburg Rules contained similar text, and that the potential of being held liable for all losses in connection with the shipment was thought to be an adequate reflection of the serious nature of this obligation. In response, the view was expressed that the regime of strict liability for the shipper's failure to provide information already provided an adequate incentive for the shipper to comply, and that the draft convention should not contain penalty rules. It was suggested that a possible compromise approach might be to require there to be a causal link between the dangerous goods and the loss.

Proposed modifications to the text

169. As a general observation it was suggested that the references to the performing party and to the phrase "directly or indirectly" should be deleted from this provision for the same reasons indicated above for draft paragraph 33 (2). In addition, it was suggested that "delay" and "loss" should be modified in the same fashion as those terms in paragraph 2 and in draft article 31.

Conclusions reached by the Working Group regarding draft paragraph 33 (3):

170. After discussion, the Working Group decided that:

- The words "directly or indirectly" should be deleted as in paragraph 2;
- The provision should be revised so as to treat 'delay' and 'loss' consistently in draft articles 33 (2), 33 (3) and 31;
- The words "such shipment" should be placed in square brackets for further consideration by the Working Group;
- The words "such failure to inform" should be added in square brackets after the words "such shipment" for further consideration by the Working Group.

Draft article 34. Assumption of shipper's rights and obligations

General discussion

171. The Working Group was reminded that it had last considered draft article 34 at its thirteenth session (see A/CN.9/552, paras. 154 to 158).

172. It was indicated that draft article 34 was intended to deal with the situation of the FOB seller who was named as the shipper in the transport document, and the assumption by that documentary shipper of the contractual shipper's rights and obligations by virtue of the acceptance or receipt of the transport document. There was support for the view that the documentary shipper should be required to accept that identity before it could be held accountable, and it was suggested that the term "accepts" should be retained and the brackets and other possible terms deleted, as "accepts" best conveyed the intended requirement. It was also suggested that the

words "that its name appears on the transport document or the electronic transport record as the shipper" should be inserted after the word "accepts", in order to narrow the interpretation of the draft provision. There was also support for this suggestion, although some concern was expressed that a requirement for acceptance by the documentary shipper could lead to abuses in situations where a party would attempt to avoid its liability by refusing to accept the document.

173. It was also suggested that the application of draft article 34 should be limited to cases where the carrier did not know the identity of the contractual shipper. However, some doubt was expressed regarding how often that would arise in practice, and it was observed that draft paragraph 37 (b) required the instruction of the contractual shipper to include a person other than the contractual shipper in the transport document.

174. There was support for the suggestion that draft article 34 should clearly indicate that the provision did not relieve the contractual shipper from its obligations, as expressed in draft paragraph 34 (2) contained in paragraph 35 of A/CN.9/WG.III/WP.55. Support was also expressed for a proposal to insert the bracketed text in A/CN.9/WG.III/WP.56 "subject to the responsibilities and liabilities" and to delete the brackets. There was agreement that the text as it appeared in A/CN.9/WG.III/WP.55 reflected these amendments and should be included in the draft convention.

Conclusions reached by the Working Group regarding draft article 34:

175. After discussion, the Working Group decided that:

- The text of draft article 34 contained in paragraph 35 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The phrase "receives the transport document or the electronic record" in draft paragraph 34 (1) of the text in A/CN.9/WG.III/WP.55 should be substituted with the words "accepts that its name appears on the transport document or the electronic transport record as the shipper".

Draft article 35. Vicarious liability of the shipper

General discussion

176. The Working Group was reminded that it had last considered draft article 35 at its thirteenth session (see A/CN.9/552, paras. 159 to 161).

177. It was recalled that draft article 35 was intended to duplicate with respect to the shipper the provisions in draft article 19 relating to the liability of the carrier for its agents, employees, and servants. However, the view was expressed that this provision could cause problems of interpretation in various provisions of the draft convention where, for example in draft subparagraph 17 (3)(i), reference was made to "the shipper or any person referred to in article 35, the controlling party or the consignee". It was observed that this construction could be interpreted to mean that the employees and agents of the shipper were included, but not the employees or agents of the controlling party or the consignee. Unlike draft article 35, draft article 19 with respect to the carrier's employees and agents was a core provision of the draft convention and did not pose the same interpretation problems as the carrier was not often referred to in the same phrase as other parties so as to cause

confusion. Given this difficulty, it was suggested that draft article 35 should be deleted.

178. However, general support was expressed for the inclusion of a provision such as draft article 35, notwithstanding the possible difficulties in interpretation given its current use in the draft instrument. It was further observed that if consideration were to be given to including in the draft instrument a provision on the limitation of liability of the shipper, a provision such as draft article 35 would be important to include agents, employees and servants who would receive the benefit of that limitation on liability. There was support for the proposal that the alternative draft contained in paragraph 41 of A/CN.9/WG.III/WP.55 be included in the draft convention as more clearly expressing the same principles as the text in A/CN.9/WG.III/WP.56.

179. It was suggested that the phrase "on the carrier's side" in draft article 35 (2) in the text in A/CN.9/WG.III/WP.55 was unnecessary since "performing party" was defined in the draft convention as persons acting on behalf of the carrier. It was further observed that draft article 35 might need further consideration in light of draft paragraph 14 (2), when under "free in and out (stowed)" (FIO(S)) clauses, the carrier contracted out certain of its obligations to the shipper, and should not be liable for the actions of the shipper's employees or agents in carrying out those obligations.

Conclusions reached by the Working Group regarding draft article 35:

180. After discussion, the Working Group decided that:

- The text of draft article 35 contained in paragraph 41 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The Secretariat should be requested to verify and harmonize the references to draft article 35 in other articles of the draft convention;
- The title of the article should be revised to ensure linguistic uniformity in the various languages.

Draft article 36. Cessation of shipper's liability

General discussion

181. The Working Group was reminded that it had last considered draft article 36 at its thirteenth session (see A/CN.9/552, paras. 162 to 164), when it was decided to delete draft chapter 9 of the draft convention on freight, but to retain draft article 36 for further consideration.

182. There was support expressed for draft article 36, which would render invalid cesser clauses, in which the liability of the shipper would cease upon a certain event. It was also indicated that draft article 36 was related to draft article 94 (2) of the draft convention, which voided any provision that excluded or limited the obligations of the shipper, and that any decision on draft article 94 (2) would affect the deliberations of the Working Group on draft article 36. However, the view was also expressed that draft article 36 was related to but distinct from draft paragraph 94 (2), at least insofar as draft article 36 dealt with the payment of freight.

Conclusions reached by the Working Group regarding draft article 36:

183. After discussion, the Working Group decided that:

- The brackets around draft article 36 should be removed and its text should be retained; and
- Draft article 36 should be reconsidered in light of the decision taken with respect to draft article 94 (2).

Draft article 18. Carrier's liability for failure to provide information and instructions

General discussion

184. The Working Group next discussed draft article 18, which was closely related to the obligations of the shipper, and, in particular, to draft article 29. The Working Group was reminded that it had last considered draft article 18 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

185. Wide support was expressed for the deletion of draft article 18, regardless of the disposition of draft article 29. It was indicated that draft article 18 could create confusion regarding whether or not it was intended to create a separate cause of action in addition to draft article 17, as well as with respect to its interaction with draft article 17 (4) on concurring causes of liability. It was further indicated that since a fault-based liability regime was applicable to draft article 29, and that a breach of that obligation that caused loss or damage or delay would be covered by draft article 17 of the draft convention, draft article 18 was considered superfluous.

186. A contrary view was expressed that draft article 18 should be retained to keep the contractual balance between the parties of the contract of carriage. A few delegations expressed their desire to defer the consideration of draft article 18 to a later session of the Working Group pending consultations.

Conclusions reached by the Working Group regarding draft article 18:

187. After discussion, the Working Group decided that:

- Draft article 18 should be placed in square brackets for final disposition at the next session, pending the instructions of a few delegations but debate on the issue should not be reopened.

Delivery of goods—Chapter 10, including period of responsibility of the carrier (draft article 11) and draft article 14 (2)

General discussion

188. The Working Group was reminded that it had last considered draft chapter 10 at its eleventh session (see A/CN.9/526, paras. 62 to 99), and that it had last considered the period of responsibility of the carrier and draft article 14 (2) at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43).

189. The Working Group heard that A/CN.9/WG.III/WP.57 had been prepared with a view to facilitating the discussions of the Working Group regarding the delivery of

goods, the period of responsibility of the carrier, and issues in draft article 14 (2) concerning the period of responsibility. Informal consultations took place regarding those issues on the basis of that document.

Draft article 11. Period of responsibility of the carrier

General discussion

190. The Working Group was reminded that it had last considered the period of responsibility of the carrier and draft article 14 (2) regarding FIO(S) clauses at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43). The Working Group considered the text of these provisions as found in annexes I and II of A/CN.9/WG.III/WP.56.

191. The Working Group heard that, in the responses to the informal questionnaire in A/CN.9/WG.III/WP.57, most of the respondents approved of the general approach taken by draft paragraphs 11 (1), (2) and (4).

Draft paragraph 11 (1)

192. General satisfaction was expressed with the text and the approach taken in draft paragraph 11 (1). As a general comment, it was observed that care should be taken that consistent terminology was used throughout the draft convention, particularly in respect of terms such as "place of delivery", "time and location of delivery", "place of receipt", and the like. A suggestion was made to delete the closing phrase "to the consignee" as unnecessary and potentially confusing in light of the fact that the carrier sometimes effected delivery by delivering the goods to an authority, such as a port authority, rather than to the consignee. There was some support for this suggestion. However, contrary views were also expressed that deletion of the phrase could be problematic, since draft article 13 stated that delivery to the consignee was a core obligation of the carrier, and it was suggested that special cases such as delivery to authorities or to persons other than the consignee should be included in draft paragraphs 11 (3) and (5). Support was expressed for the suggestion that the text of draft paragraph 1 should remain unchanged and that concerns raised regarding parties to whom the carrier could deliver other than the consignee could be considered with respect to draft paragraph 11 (5).

193. It was observed that draft article 46, concerning the carrier's duty of care in looking after goods left in its custody could be seen as related to draft paragraph 1, and the question was raised whether draft paragraph 1 should be made subject to both draft articles 12 and 46. In response, the view was expressed that the draft convention was structured in such a way that draft article 11 concerned the period of responsibility of the carrier pursuant to the contract of carriage. By way of contrast, it was noted that draft article 46 dealt with the period before the carrier was able to make delivery, but that it was focussed on a time at which the carrier no longer had any responsibilities pursuant to the contract of carriage. It was suggested that this distinction should be made clearer, and that it could be further discussed when the Working Group considered draft article 46.

Conclusions reached by the Working Group regarding draft paragraph 11 (1):

194. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (1) would be maintained, but the decision whether to delete the phrase "to the consignee" would be taken only after the Working Group had considered draft paragraph 11 (5).

Draft paragraph 11 (2)

195. The Working Group expressed its general satisfaction with draft paragraph 11 (2). It was suggested that some minor drafting changes could be made to improve the clarity of the paragraph, such as the inclusion of the phrase "the carrier's" after the phrase "time and location of" in the second sentence.

Conclusions reached by the Working Group regarding draft paragraph 11 (2):

196. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (2) should be maintained, but that detailed drafting changes to improve the clarity of the paragraph should be considered by the Secretariat.

Draft paragraph 11 (4)

197. It was observed that while draft paragraphs 11 (2) and 11 (4) both contained default rules for identifying the time and location of receipt and delivery, respectively, the second sentences of those paragraphs differed. While the second sentence of draft paragraph 11 (2) referred to a precise moment when receipt of the goods occurred, it was observed that there was no equally precise moment established in the second sentence of draft paragraph 11 (4) for the delivery of the goods. Some support was expressed for the view that drafting should be included in paragraph 4 to make the moment of the delivery as precise as the moment of receipt in paragraph 2.

198. It was also noted that draft paragraphs 11 (2) and 11 (4) differed in that draft paragraph 4 did not refer to an identifiable location. A suggestion was made that draft paragraph 11 (4) should refer to the location of discharge as a reasonable one. There was some support for this suggestion. However, a doubt was raised regarding how it would be decided when and where the goods were delivered if the goods were discharged in an unreasonable place, or whether that decision would be left to a court. It was also pointed out that there would be no default rule regarding the time and location of delivery when the goods were delivered in an unreasonable place, if the suggestions were adopted.

199. By way of explanation of the differences between draft paragraphs 11 (2) and 11 (4), it was noted that in port-to-port carriage, goods were seldom delivered all at once, and that there was usually a time period between the actual delivery of the goods to the carrier and their loading. The view was expressed that in such circumstances, it was reasonable to expect that this period would be within the carrier's period of responsibility. It was further explained that it would be rare in the case of a port-to-port carriage that resort would be had to the default rule in the final sentence of draft paragraph 4, since most ports had customs or practices, but that in such exceptional cases, it was decided to use the rule that the period of responsibility should end when and where the carriage ended.

200. There was support for the view that the Secretariat should be requested to make adjustments to the text of draft paragraph 11 (4) in order to reflect the concerns expressed in the Working Group and to ensure its consistency with draft paragraphs 1 and 2. Caution was voiced, however, that in that exercise, regard should be had to the possible interpretation of the final phrase of the paragraph to mean that delivery took place when and where the container was unpacked.

Conclusions reached by the Working Group regarding draft paragraph 11 (4):

201. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (4) should be maintained, but that drafting changes to ensure the consistency of the paragraph with the rest of the draft article should be considered by the Secretariat, in addition to consideration of whether a requirement of 'reasonableness' should be added to the location of delivery.

Draft paragraphs 11 (3) and (5)

202. General satisfaction was expressed with the text and the approach taken in draft paragraphs 11 (3) and (5). One suggestion was made to clarify the final phrase of draft paragraph 5 with text such as "the time and location of such handing over is the time and location of the delivery of the goods", but it was thought that general drafting would accomplish that goal. Further, it was thought that the suggested deletion of the phrase "to the consignee" in reference to draft paragraph 11 (1) (see above, para. [...]) was no longer necessary in light of revisions to be considered with respect to draft paragraphs 11 (2) and (4).

Conclusions reached by the Working Group regarding draft paragraphs 11 (3) and (5):

203. After discussion, the Working Group decided that:

- The text of draft paragraphs 11 (3) and (5) would be maintained, with any necessary drafting adjustments for greater precision and consistency.

Draft paragraph 11 (6) and draft paragraph 14 (2): FIO(S) clauses

204. It was observed that draft paragraph 11 (6) was intended to operate in concert with draft paragraph 14 (2) in an effort to provide a solution for the treatment of FIO(S) clauses, which, in some States, determined the period of the responsibility of the carrier. There was support for the view that draft paragraph 6 would not be acceptable if draft paragraph 14 (2) was deleted, but that read together with draft paragraph 14 (2), the two provisions established an acceptable approach to FIO(S) clauses. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage.

205. In addition, it was observed that the current text of draft paragraph 14 (2) restricted the obligations that could be contracted out by the carrier to the shipper or other parties to those listed in draft paragraph 14 (2). Further, the view was expressed that draft paragraph 11 (6) was helpful since it made clear that loading and discharging took place during the period of responsibility of the carrier.

206. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft article 10. A concern was expressed that allowing for FIO(S) clauses in the draft convention would lead to their spread from the non-liner to the liner trade, and increase the potential for their abuse, but it was suggested that commercial realities made this unlikely. In this context, it was suggested that, as a matter of drafting, the reliance on FIO(S) clauses could be restricted to the non-liner trade. Other concerns were raised that the operation of draft paragraphs 11 (6) and 14 (2) could limit the parties' current freedom of contract regarding FIO(S) clauses in the non-liner trade, particularly with respect to the allocation of risk. In light of this possibility, it was suggested that the FIO(S) clause should define the period of responsibility of the carrier.

207. Some drafting modifications were proposed. It was suggested that the phrase "and shall be the responsibility of" be inserted after the phrase "performed by" in first sentence of draft paragraph 14 (2). It was also suggested that the word "initial" should be added before the word "loading", and that the word "final" should be added before the word "discharging" in draft paragraph 14 (2) in order to make it consistent with draft paragraph 11 (6) and to exclude intermediate ports. However, it was emphasized that the focus in the current discussion should be on the overall approach established by the combined operation of draft paragraphs 11 (6) and 14 (2) to establish a compromise solution for FIO(S) clauses. In that spirit, there was support for the suggestion that the square brackets around draft paragraph 14 (2) be removed, and the text retained for further discussion. It was further observed that, in light of the Working Group's approval of the approach outlined in draft paragraphs 11 (6) and 14 (2), the square brackets around the phrase "[actually performed]" in draft subparagraph 17 (3)(i) should be removed and the text retained. It was thought that this revision to draft subparagraph 17 (3)(i) could render unnecessary the suggestion noted above to include the phrase "and shall be the responsibility of" in draft paragraph 14 (2).

Conclusions reached by the Working Group regarding draft paragraph 11 (6):

208. After discussion, the Working Group decided that:

- The text of draft paragraph 11 (6) should be maintained;
- The square brackets around draft paragraphs 14 (2) and 17 (3)(i) should be deleted and the text maintained; and
- Drafting changes to ensure the consistency of the paragraph with the rest of the draft article, as well as general drafting improvements should be considered by the Secretariat.

Draft article 46. Obligation to accept delivery

General discussion

209. The Working Group was reminded that it had last considered draft article 46 on the obligation to accept delivery at its eleventh session (see A/CN.9/526, paras. 65 to 72). The text of draft article 46 considered by the Working Group was as set out in annexes I and II of A/CN.9/WG.III/WP.56.

210. As a general comment, a question was raised regarding the consequences for breach of the consignee's obligation to accept delivery under draft article 46. The view was expressed that such a breach should not automatically trigger an action for damages. In response, it was suggested that breach of the draft article 46 obligation to accept delivery fell into the category of general rights and liabilities of the shipper and the carrier that were not specifically addressed by the draft convention, and that the consequences of a breach would thus be left to national law. As a general matter, it was also observed that this draft article should be carefully coordinated with the provisions on right of control, since it was thought that the timing of the consignee's obligation to accept delivery should accord with the transfer of the right of control. However, another view was expressed that the duty of the consignee to accept delivery should not depend on a transfer of rights, since it was a practical matter that should be regulated by the draft convention. Further, it was stated that while the content of draft article 46 was useful and should be retained, care should be taken in including provisions regulating the post-delivery period as this was outside the scope of the convention and the contract of carriage.

First sentence: the duty of the consignee

211. There was general support for the view that the duty of the consignee to accept delivery should be conditional since it was thought that there must be an action or intention expressed on the part of the consignee to trigger its obligation to accept delivery. Some expressed the view that this was best accomplished by deleting the brackets around the text in the first sentence of draft article 46 and retaining the text. However, concern was raised that the requirement that the consignee "exercise its rights under the contract of carriage" was too broad and unclear, and it was suggested that the condition should reflect a consignee's implied or actual acceptance to be the consignee. In response, it was said that the bracketed text was the appropriate condition to attach to the consignee's obligation to accept delivery because it was acknowledged that the obligation should extend to those who have both explicitly and implicitly accepted to be the consignee, but it was thought that the notion of "acceptance" was too narrow a condition to cover what was intended. It was suggested that, for example, consistent with international sales law, if the consignee sampled the goods it would have exercised rights under the contract of carriage, and would have the obligation to accept delivery from the carrier. However, doubts were still expressed whether the text in square brackets was the best way to indicate the implied consent necessary to trigger the obligation of the consignee, and the view was also expressed that, while somewhat instructive, the qualifications in draft article 62 (3) were better suited to define what was not implied consent rather than what was implied consent.

212. Other views were expressed that obligation of the consignee to accept delivery should be unconditional and that the bracketed text in the first sentence of draft

article 46 should be deleted. It was thought that unless the text in brackets was deleted, the consignee could elect not to exercise any rights under the contract of carriage and thus could avoid the obligation to take delivery of the goods. It was suggested that this result would not be fair to a carrier that had completed the terms of the contract of carriage, and further, that there was a need to avoid an increase in the problem of unclaimed cargo.

213. In addition, it was noted that the reference in draft article 46 was to the consignee's obligation to accept delivery of the goods at the time and location referred to in draft paragraph 11 (4). However, it was observed that the current text did not address the situation whether the consignee also had an obligation to accept the goods when they arrived late.

214. A further suggestion made was that the consignee should be notified of the arrival of the goods at destination. The view was expressed that introducing notification of the consignee as a legal obligation was not advisable, since sending a notice of readiness was already a standard practice in the industry for the benefit of both the carrier and the consignee, and there did not appear to be any legal problem with respect to such notices. It was thought that a legal requirement in this regard could give rise to unnecessary bureaucracy and could present evidentiary difficulties. Further, it was noted that in current practice, tracking the location of goods electronically was broadly available.

Second sentence: standard of care of the carrier

215. It was observed that the second sentence of draft article 46 was intended to set out the standard of care and the liability of the carrier with respect to the goods left in its custody in case of a breach of the consignee's obligation to accept delivery. There was general support for the view that the second sentence of draft article 46 should be addressed in conjunction with draft article 51 regarding the carrier's rights when the goods were undeliverable and draft article 53 with respect to the carrier's liability for undeliverable goods, and the sentence should be possibly moved from draft article 46 to be combined with draft article 53.

216. There was general support for the view that the content of the second sentence on the standard of care should be retained. However, the view was expressed that the standard of care required of the carrier and the liability arising from breach of that standard were too low as set out in the second sentence of draft article 46, while other views were that the standard of care was acceptable. The view was also expressed that the carrier's standard of care in the second sentence arose outside of the scope of the contract of carriage and that in some jurisdictions this gave rise to the concept of "agency by necessity" which placed a standard of care of "reasonableness" on an agent, but that the standard of care expressed in the second sentence was higher than that duty. A further suggestion regarding the standard of care was that an intermediate standard that the carrier should be required to treat the goods as though they were its own, such as that existing in some national legal systems, should be adopted.

217. Other views were that the standard of care of the carrier contained in the second sentence was too low considering that the reasons for non-acceptance of delivery by the consignee could be varied and outside of its control. The suggestion was also made that if an appropriate standard of care could not be agreed upon, and

if the sentence were deleted, that that might not be sufficient to leave the matter to national law, and it could be necessary to include an express provision stating that the standard of care was governed by applicable law.

218. In support of deleting draft article 46 in its entirety, the view was expressed that since the draft convention already contained adequate rules regarding the right of control and the rights of the carrier in such circumstances, it would be better to delete draft article 46 than to leave any uncertainty regarding whether a breach of the consignee's obligation to accept delivery would trigger damages. In response, it was said that the duty of the consignee to accept delivery of the goods was an important one that needed to be explicit, and there was support for the view that draft article 46 should thus be retained.

Conclusions reached by the Working Group regarding draft article 46:

219. After discussion, the Working Group decided that:

- The text of draft article 46 should be maintained, with any necessary drafting adjustments, particularly following the discussion of draft articles 51 and 53.

Draft article 47. Obligation to acknowledge receipt

General discussion

220. The Working Group was in agreement that article 47 as set out in annexes I and II of A/CN.9/WG.III/WP.56 should be adopted, subject to drafting improvements.

Additional considerations under draft article 47

221. The Working Group heard the view that the consequences of a failure to acknowledge receipt of the goods pursuant to draft article 47 should be made express in the draft instrument, since such a result could be seen as a failure of the carrier's draft article 13 obligation to deliver the goods pursuant to the contract of carriage. Another aspect of this issue expressed for the future consideration of the Working Group was said to be that the draft instrument should include a provision on the right of the carrier to retain the goods in cases when the consignee failed to fulfil its obligation to provide proper identification or for non-payment of freight, since the current system of resort to national law or the use of a retention clause in the contract of carriage was thought to be unsatisfactory. Support was expressed for that proposal.

Conclusions reached by the Working Group regarding draft article 47:

222. After discussion, the Working Group decided that:

- Draft article 47 should be adopted, subject to drafting improvements; and
- Consideration should be given to drafting text as proposed in paragraph 221 above.

Draft article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

General discussion

223. The Working Group was reminded that it had last considered draft article 48 at its eleventh session (see A/CN.9/526, paras. 74 to 77). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

224. The Working Group was reminded that draft article 48 was intended to govern delivery when no negotiable transport document or electronic record had been issued.

Draft paragraph 48 (a)

225. It was indicated that draft paragraph 48 (a) aimed at having the controlling party provide the carrier with the consignee's name and address if they were not provided in the contract particulars so as to enable the carrier to make delivery. There was agreement with the suggestion that the text should be adjusted to accommodate the operation of some domestic regulations requiring the controlling party to provide the information earlier than the time foreseen in the draft convention. It was further indicated that the word "thereof" should be substituted with the words "name and address of consignee" to improve the clarity of the text. The view was also expressed that draft paragraph 48 (a) should be deleted as the substance of the draft provision was thought to have been dealt with in draft article 59.

Draft paragraph 48 (b)

226. It was noted that draft paragraph 48 (b) had three variants. A large number of delegations expressed support for the retention in the draft convention of variant C of the draft provision. It was indicated that variant C did not qualify the identification of the consignee as a prerequisite for the delivery of goods, thus avoiding the undesirable consequence that delivery of the goods by the carrier to the right consignee without proper identification would be held invalid. It was added that variant C would accurately reflect the notion that the identification of the consignee was a right of the carrier and not an obligation. It was further indicated that variant C would also achieve the desirable result to leave matters related to forgery of documents to national law. However, some support was also expressed in favour of variant A of draft paragraph 48 (b), as it was indicated that that variant better expressed the duty of the carrier to identify the consignee. The view was also expressed that draft paragraph 48 (b) should be deleted and that the substance of the draft provision should be dealt with in draft article 47 by adding to that article reference to identification of the consignee.

227. It was suggested that the reference to the time and location of the delivery mentioned in draft article 11 (4) in variant C of draft paragraph 48 (b) should be substituted with a reference to the time and location of the delivery agreed in the contract of carriage, since it was thought that draft article 11 (4) dealt mainly with the definition of the period of responsibility of the carrier. However, it was also observed that such a change could create problems in practice, since contracts of carriage seldom stated the time of delivery, and it was suggested that the matter

required further consideration, or, alternatively, that all references to the time of delivery in the draft instrument should be reconsidered.

228. It was indicated that the matter of straight bills of lading, which could also arise in conjunction with draft paragraph 48 (b), would be the topic of a future proposal. A preliminary view was expressed that straight bills of lading would best dealt with at a general level in the draft chapter on documents of transport of the draft convention.

Draft paragraph 48 (c)

229. It was observed that draft paragraph 48 (a) did not provide for the consequences of the failure of the controlling party to provide the name and address of the consignee, but it was added that the specification of such consequences would be better placed in draft paragraph 48 (c) by inserting the following text at the beginning of the paragraph, "If the name and address of the consignee are not known to the carrier or". It was further suggested that draft paragraph 48 (c) should contain a reference to the notice from the carrier to the consignee, through the insertion of the phrase "after having received notice" after the phrase in the text "if the consignee".

Conclusions reached by the Working Group regarding draft article 48

230. After discussion, the Working Group decided that:

- Suggestions made for drafting improvements to paragraphs (a) and (b) should be considered;
- Variant C of draft paragraph 48 (b) should be retained in the draft convention; and
- The words "If the consignee" at the beginning of draft paragraph 48 (c) of the draft convention should be substituted by the words "If the name or the address of the consignee are not known to the carrier or if the consignee, after having received notice,".

Draft article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

General discussion

231. The Working Group was reminded that it had last considered draft article 49 at its eleventh session (see A/CN.9/526, paras. 78 to 90). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

232. It was explained that draft article 49 aimed at reforming the system of negotiable transport documents in maritime carriage, and, especially, at eliminating the problems resulting from goods that arrived at the place of destination prior to the arrival of the bill of lading. In practice, certain techniques had been developed to deal with that problem, such as delivering the goods against the issuance of a letter of indemnity, but it was thought that these solutions remained unsatisfactory. It was suggested that the draft provision would restore the original function of the bill of lading and bring relief for the problems associated with "stale" bills of lading.

233. It was further indicated that the draft provision would have a significant impact on current banking practices, particularly by reducing the value of bills of lading in the hands of intermediary banks, and by seriously affecting the current system of documentary credit. In light of this impact on the banking industry, the view was expressed that perhaps certain modifications should be made to draft article 49 to limit its scope, such as limiting its application only to bills of lading that contained an express statement to that effect. While caution was still expressed with respect to the actual operation of draft article 49, it was observed that the changes it would bring were thought to be welcome in some sectors of the banking industry, which were also in search of clear and predictable rules in this regard, and that positive comments with respect to the proposed new regime had been received from other banking interests. There was general support in favour of the consideration of the draft article 49 regime as a basis for discussion.

Draft paragraph 49 (a)

234. It was indicated that draft paragraph 49 (a) provided that the holder of a negotiable transport document or a negotiable electronic transport record was entitled to claim delivery of the goods upon surrender of that document or record. It was observed that draft paragraph 49 (a) could have an impact on the right of stoppage in transit and that the interaction between the two needed further reflection. In response, it was indicated that the right of stoppage was a remedy available under the contract of sale, but that in practice its exercise required control of the bill of lading, and that this prevented any conflict between draft paragraph 49 (a) and the right of stoppage. In response, it was suggested that the draft convention should clarify that its provisions did not affect domestic property and bankruptcy laws.

235. A drafting suggestion was made to change the phrase "is entitled" in draft paragraph 49 (a) to "is required" in order to conform with the consignee's obligation to accept delivery pursuant to draft article 46.

Draft paragraph 49 (b)

236. It was indicated that draft paragraph 49 (b) dealt with cases in which the cargo had arrived at destination but the holder of the negotiable transport document or negotiable electronic transport record did not claim delivery of it. It was explained that in such a case, the carrier had an obligation to advise the controlling party of the failure of the holder to claim delivery, but when the controlling party could not be identified, the carrier was entitled to ask instructions of the shipper in respect of the delivery of the goods.

237. It was suggested that the draft provision should better specify the level of diligence required of the carrier in seeking identification of the controlling party, and that the draft provision should be amended to include situations in which a person who was not the holder claimed delivery of the goods. Alternatively, it was suggested that draft paragraphs 49 (b) and (c) could be deleted, and the carrier could be referred to the remedies for undeliverable goods that it had under draft article 51. Under this proposal, it was suggested that the entitlement of the holder to the goods would remain unchanged and that the holder would be entitled to the proceeds of the sale of the goods pursuant to draft article 51. However, it was observed that the

remedies of draft article 51 have been available in current practice for some time, and yet the problems outlined with respect to bills of lading had not been solved.

238. In response to an inquiry, it was observed that the requirement for the carrier to advise the controlling party of the non-appearance of the holder was considered to be an obligation of the carrier. Further, the view was expressed that, in light of trade practices, this obligation of the carrier to advise the controlling party was not thought to be onerous. In addition, it was suggested that it should be made clearer that draft paragraph 49 (b) concerned the situation when the cargo had arrived but there was no interest in claiming it, while draft paragraph 49 (d) concerned the situation when delivery was possible but there was no bill of lading, and while draft article 51 concerned a third situation when no one would claim delivery and the carrier could dispose of the cargo.

Conclusions reached by the Working Group regarding draft paragraphs 49 (a) and (b)

239. After discussion, the Working Group decided that:

- The text of draft paragraph 49 (a) should be maintained, pending the consideration of the Working Group of the remainder of the draft article;
- The text of draft paragraph 49 (b) should be maintained for further consideration of the Working Group in light of the observations expressed above; and
- The discussion of draft paragraphs 49 (c), (d) and (e) would be taken up during the Working Group's next consideration of draft chapter 10.

III. Other business

Scheduling of seventeenth and eighteenth sessions

240. The Working Group noted that its seventeenth session was scheduled to be held in New York from 3 to 13 April 2006. The Working Group took note with appreciation of the decision made by the Commission at its thirty-eighth session that two-week sessions would be allocated to the Working Group for continuation of its work (see A/60/17, para. 240).

241. It was noted that, subject to the approval of the Commission at its thirty-ninth session, the eighteenth session of the Working Group was scheduled to be held in Vienna from 6 to 17 November 2006 (see A/60/17, para. 241).

Planning of future work

242. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda, for treatment in the order indicated, for the completion of its second reading and the commencement of its third reading of the draft instrument:

Seventeenth session (New York, 3 to 13 April 2006):

- Right of control;
- Transfer of rights;
- Delivery of goods (continued);
- Scope of application and Freedom of contract;
- Shipper's obligations; and
- Transport documents.

Eighteenth session (Vienna, 6 to 17 November 2006, subject to approval):

- Remaining issues from the seventeenth session, if any;
- Rights of suit and Time for suit;
- Limitation of liability, including draft article 104 on amendment of limitation amounts;
- Final clauses;
- Jurisdiction and arbitration.

243. In light of the complexity of the issues on the agenda of the forthcoming seventeenth session of the Working Group, it was suggested by some delegations that a seminar of study should be held to assist delegations in preparing that session. It was further suggested that the seminar might be held in London, on 23 and 24 January 2006. Although it was stressed that the seminar was not an event organized or sponsored by UNCITRAL, efforts would be made to accommodate interventions in English and French. All interested delegations were invited to participate, and the Secretariat was requested to provide the relevant information on the UNCITRAL web site.

244. Delegations noted the importance of understanding the implications of the volume contracts regime on small or unsophisticated volume shippers. It was indicated that, while accepting the reality that the notion of volume contracts was a compromise in the draft convention, that legal notion was not widely known in all domestic jurisdictions and therefore it was felt that the implications of the treatment of volume contracts in the draft convention could not be fully appreciated by all delegations. With a view to further expedite the preparation of the draft convention, wide support was expressed for the preparation of an explanatory document on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications. It was also suggested that the Comité Maritime International (CMI) should be requested to assist in the preparation of such document in light of its highly specialized technical capacity, and the CMI expressed its willingness to assist in that regard.

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Corrigendum

Section II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Draft article 29. Carrier's obligation to provide information and instructions

In the third line of paragraph 123, "chapter 7" should be replaced with "chapter 5".

Draft article 31. Basis of shipper's liability

In the fourth line of paragraph 141, "paragraphs [...]" should be replaced with "para. 119".

Draft article 34. Assumption of shipper's rights and obligations

In the third line of paragraph 174 and the first line of the first indented paragraph of paragraph 175, "paragraph 35" should be replaced with "paragraph 39".

Draft article 11. Period of responsibility of the carrier

In the seventh line of paragraph 202, "para. [...]" should be replaced with "para. 192".

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I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures and the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

2. The most recent summary of the discussions of the Working Group on interim measures, preliminary orders and the form of arbitration agreement is contained in document A/CN.9/WG.II/WP.140, paragraphs 5 to 26. The Secretariat was asked to prepare proposals on the form in which the revised versions of draft article 17 of the Arbitration Model Law relating to the power of an arbitral tribunal to order interim measures, of a new article to the Arbitration Model Law relating to the recognition and enforcement of interim measures (tentatively numbered article 17 bis), of a new article to the Arbitration Model Law relating to court-ordered interim measures (tentatively numbered article 17 ter) could be presented, for consideration by the Working Group at its forty-fourth session. The Secretariat was also asked to prepare a revised version of draft article 7 of the Arbitration Model Law relating to the definition and form of arbitration agreement as well as a note considering how State courts have interpreted the form requirement in article II, paragraph (2), of the New York Convention and exploring the extent to which article VII, paragraph (1), of the New York Convention might assist in modernizing the form requirement for arbitration agreement, for consideration by the Working Group at its forty-fourth session.

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fourth session in New York, from 23 to 27 January 2006. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Italy, Japan, Lebanon, Madagascar, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

4. The session was attended by observers from the following States: Azerbaijan, Bangladesh, Dominican Republic, Finland, Guinea, Indonesia, Iraq, Ireland, Kyrgyzstan, Malaysia, Netherlands, New Zealand, Philippines and Ukraine.

5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: African Union,

European Community, NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration, Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Center for International Legal Studies, Association Suisse de l'Arbitrage (ASA), Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), International Chamber of Commerce (ICC), International Cotton Advisory Committee (ICAC), International Law Institute (ILI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), School of International Arbitration (Queen Mary University of London), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the London Court of International Arbitration (LCIA) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico);

Rapporteur: Mr. Mostafa Dolatyar (Islamic Republic of Iran).

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.140 and A/CN.9/WG.II/WP.140/Add.1); (b) a note by the Secretariat containing a newly revised draft of article 7 of the Arbitration Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-sixth session (A/CN.9/WG.II/WP.136); (c) a note by the Secretariat containing a proposal made by a delegation for a revision of article 7 of the Arbitration Model Law (A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1); (d) a note by the Secretariat regarding the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention (A/CN.9/WG.II/WP.139); (e) a note by the Secretariat on newly revised drafts of articles 17, 17 bis and 17 ter, for insertion in the Arbitration Model Law, prepared by the Secretariat pursuant to the decisions made by the Working Group at its forty-third session (A/CN.9/WG.II/WP.141); and (f) the report of the Working Group on the work of its forty-third session (A/CN.9/589).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of uniform provisions on interim measures and on the requirement that an arbitration agreement be in writing.
5. Possible future work in the field of settlement of commercial disputes.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

10. The Working Group resumed its deliberations on agenda item 4 on the basis of the texts contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.136, A/CN.9/WG.II/WP.137, A/CN.9/WG.II/WP.137/Add.1, A/CN.9/WG.II/WP.139 and A/CN.9/WG.II/WP.141). The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters IV to VII. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda items 5 and 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters VIII and IX, respectively.

11. The Working Group adopted the revised version of draft legislative provisions on interim measures, preliminary orders and the form of arbitration agreement as well as a text of a draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention. The Secretariat was requested to circulate the revised version of those draft provisions and the text of the draft interpretative declaration to Governments for their comments, with a view to consideration and adoption of the draft provisions and draft interpretative declaration by the Commission at its thirty-ninth session, scheduled to be held in New York, from 19 June to 7 July 2006.

IV. Draft legislative provisions on interim measures and preliminary orders

12. The Working Group recalled that, at its forty-third session (Vienna, 3-7 October 2005), it had undertaken a detailed review of the text of the revised version of article 17 regarding the power of an arbitral tribunal to grant interim measures and preliminary orders, article 17 bis regarding the recognition and enforcement of interim measures issued by an arbitral tribunal and article 17 ter on court-ordered interim measures. At that session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions on interim measures and preliminary orders could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/589, paras. 104-106). The Secretariat was also requested to take account of the suggestions that those provisions be placed in a new chapter, numbered chapter IV bis of the Arbitration Model Law, and be restructured by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106).

13. The Working Group resumed discussions on the draft legislative provisions on interim measures and preliminary orders on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group, as set out in A/CN.9/WG.II/WP.141.

Location and structure of chapter IV bis

14. The Working Group agreed that the draft legislative provisions on interim measures and preliminary orders should be located in a new chapter of the

Arbitration Model Law and agreed that the articles could be grouped into sections as suggested in A/CN.9/WG.II/WP.141.

Numbering of provisions

15. A comment was made that the Latin numbering of articles could be problematic for users unfamiliar with such numbering. In response, it was noted that the Latin numbering was consistent with the approach taken in other UNCITRAL instruments, such as, for example, article 5 bis of the UNCITRAL Model Law on Electronic Commerce.

16. After discussion, the Working Group agreed to retain the numbering of the draft legislative provisions, as set out in A/CN.9/WG.II/WP.141.

Article 17

Paragraph (1)

17. The substance of paragraph (1) was adopted by the Working Group without modification.

Paragraph (2)

18. Reservations were expressed about paragraph (2) (b) directly or indirectly allowing the use of anti-suit injunctions given that such injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well, it was said that anti-suit injunctions did not always have the provisional nature of interim measures. It was suggested that there were already a number of rules that protected the arbitral process and that a reference to anti-suit injunctions under paragraph (2) (b) was therefore unnecessary.

19. The Working Group recalled that it had already considered that matter at its forty-third session and agreed to adopt the text of paragraph (2) (b) (A/CN.9/589, paras. 20-26). It was observed that the provisions as contained in A/CN.9/WG.II/WP.141 represented a package and the Working Group should not reopen discussions on substantive issues that might affect that package.

20. The substance of paragraph (2) was adopted without modification.

Article 17 bis

Paragraphs (1) and (2)

21. The substance of paragraphs (1) and (2) was adopted without modification by the Working Group.

Article 17 ter

Title

22. A proposal was made to amend the title of article 17 ter so that it would read: "applications for preliminary orders and conditions for granting preliminary orders" in order to better reflect the content of the provision. That proposal was adopted by the Working Group.

Paragraphs (1) and (2)

23. The substance of paragraphs (1) and (2) was adopted without modification.

Paragraph (3)

24. For linguistic reasons, the Working Group agreed to reformulate paragraph (3) along the following lines:

> "(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1) (a), is the harm likely to result from the order being granted or not."

Article 17 quater

Paragraphs (1), (2), (3) and (4)

25. The substance of paragraphs (1), (2), (3) and (4) was adopted without modification.

Paragraph (5)

26. It was suggested that the reference to "preliminary order binding on the parties" was ambiguous in that it appeared to require all parties to comply with the preliminary order rather than only the party against whom the order was requested. It was further observed that, if the intention was to bind all parties, that formulation did not sufficiently clarify the nature of the obligations of the parties. In response, it was said that the plural reference to "the parties" should be retained to reflect the fact that an order would be binding not only on the party against whom the measure was directed but also on the party applying for the measure (for example, in relation to providing information or security).

27. Another proposal was made to add the following text to paragraph (5), "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal." It was suggested that that proposal would be better dealt with in article 17 undecies, which related to court-ordered interim measures. As well, it was suggested that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. In response, it was observed that article 9 dealt with interim measures and not preliminary orders. It was suggested that this proposal merely clarified the operation of provisions and did not seek to reopen substantive questions relating thereto. The Working Group took note of that proposal.

28. After discussions, the Working Group retained the text of paragraph (5), without modification.

Article 17 quinquies

29. The substance of article 17 quinquies was adopted without modification.

Article 17 sexies

Title

30. A proposal was made to delete the words "by the arbitral tribunal" from the title of article 17 sexies. That proposal was adopted.

Paragraphs (1) and (2)

31. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 septies

Paragraphs (1) and (2)

32. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 octies

33. It was decided to replace the words, "the party against whom it is directed" with the words, "any party" for the reason that the measure could impact upon any party.

Article 17 novies

Title

34. A proposal was made to delete the words "of interim measures" in order to avoid repetition of the Section title. That proposal was adopted.

Paragraph 1

35. The Working Group agreed that paragraph (1) should refer to article 17 decies instead of article 17 novies.

Paragraphs (2) and (3)

36. The substance of paragraphs (2) and (3) was adopted without modification.

Article 17 decies

Title

37. Consistent with the modification to the title of article 17 novies, the Working Group agreed to delete the words "of interim measures" from the title of article 17 decies.

Paragraphs (1) and (2)

38. The substance of paragraphs (1) and (2) was adopted without modification

Footnote

39. The Working Group agreed that the footnote to article 17 decies should refer to article 17 decies instead of article 17 novies.

Article 17 undecies

Placement of article 17 undecies

40. The Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law for the reason that it dealt with court-ordered interim measures which might not easily fit in a chapter intended to deal mostly with interim measures granted by arbitral tribunals.

41. One suggestion was to place article 17 undecies following provisions enacting article 9 of the Arbitration Model Law, which dealt with interim measures granted by courts. However, given that article 9 was located within chapter II of the Arbitration Model Law, which related to arbitration agreement, that option was not considered appropriate.

42. The Working Group agreed that wording along the lines of the text suggested in the note by the Secretariat (A/CN.9/WG.II/WP.141, para. 13) for a footnote to article 17 undecies could be included in explanatory material accompanying that provision. Such a text could draw the attention of States to the issue of placing article 17 undecies in the most appropriate part of their enacting legislation.

43. The substance of article 17 undecies was adopted without modification.

Reference to articles 17 novies, 17 decies and 17 undecies in article 1, paragraph 2 of the Arbitration Model Law

44. At its forty-third session, the Working Group noted that, given the intention that the provision on court-ordered interim measure should apply irrespective of the country where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provided that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, would apply even if the place of the arbitration was not in the territory of that State (A/CN.9/589, paras. 101-103). It was also suggested that a reference to articles 17 novies and 17 decies (which dealt with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2) of the Arbitration Model Law would read as follows:

> "The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State."

45. That proposal was adopted in substance by the Working Group.

V. Draft legislative provisions on the form of arbitration agreement

46. The Working Group recalled that, at its forty-third session, it had resumed discussions on a draft model legislative provision revising article 7 of the Arbitration Model Law on the basis of a text prepared by the Secretariat ("the revised draft article 7") following discussions in the Working Group held at its thirty-sixth session (New York, 4-8 March 2002) (A/CN.9/508, paras. 18-39) and had also considered a proposal by the Mexican delegation regarding that issue

reproduced in A/CN.9/WG.II/WP.137, as modified by A/CN.9/WG.II/WP.137/Add.1 ("the alternative proposal") (A/CN.9/589, paras. 108-112). It was further recalled that the Working Group had considered that both texts provided useful options to address concerns relating to the form of arbitration agreement. The Working Group agreed to further consider both options.

The alternative proposal

47. It was noted that the alternative proposal omitted entirely the writing requirement. It was said that, if that text were adopted, the question of the conclusion of the arbitration agreement and its content would be solely a matter of proof rather than of validity. It was said that the revised draft article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements to recognize, for example, oral arbitration agreements. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. While the alternative proposal was met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries. It was also stated that the purpose of the revision of paragraph (2) of article 7 of the Arbitration Model Law was to harmonise existing domestic laws in that respect and it was suggested that that purpose would be better achieved by the revised draft article 7 than the alternative proposal (for discussion on the alternative proposal, see also below, paragraphs 74 and 75).

48. The Working Group continued its discussion based on the revised draft article 7, as contained in A/CN.9/WG.II/WP.136. The Working Group was reminded that, whatever formulation was accepted in relation to paragraph (2) of article 7 of the Arbitration Model Law, it would be necessary to consider the impact of that provision upon article 35, given that that article included a cross-reference to article 7 in its requirement in paragraph (2), which provided that the party relying on an award or applying for its enforcement "supply the original arbitration agreement referred to in article 7 or a duly certified copy thereof" (for discussion on that matter, see below, paragraphs 76 to 80).

Revised draft article 7

Paragraph (1) of the revised draft article 7

49. The substance of paragraph (1) was adopted without modification.

Paragraphs (2) and (3) of the revised draft article 7

50. Support was expressed for retaining the substance of paragraph (2) as it gave a clear indication, consistent with article II, paragraph (2), of the New York Convention, that arbitration agreements had to be in writing and provided examples regarding the meaning of the writing requirement. However, it was noted that paragraph (2) of the revised draft article 7 sought by way of a definition to clarify that the term "writing" covered modern means of communications that might not be considered, in some countries, as meeting the writing requirement. A concern was expressed that this approach would be inconsistent with the approach taken in

UNCITRAL texts on electronic commerce, which relied not on a definition but on a functional equivalence approach to "writing".

Compliance of paragraph (2) of the revised draft article 7 with the UN Convention on the Use of Electronic Communications in International Contracts ("the Convention on Electronic Contracts")

51. It was observed that the revised draft article 7 had been prepared before the UNCITRAL Working Group on Electronic Commerce finalized its work on the Convention on Electronic Contracts and that it should be revised to ensure consistency with that Convention. In addition, it was observed that article 20 of that Convention included the New York Convention in the list of international instruments to which it applied and that, to the extent the Arbitration Model Law might be used to assist with the interpretation of the New York Convention, it would be important to ensure compatibility between the three instruments.

52. It was suggested that the formulation in paragraph (2) of article 9 of the Convention on Electronic Contracts, which provided that an electronic communication met a requirement under law that it be in writing "if the information contained therein is accessible so as to be useable for subsequent reference" could be used in the revised draft article 7 as follows: "A data message satisfies the requirement for writing if the information contained therein is accessible so as to be useable for subsequent reference." That proposal received some support.

"concluded or documented"

53. With a view to achieving the required level of flexibility, it was said that the form requirement for arbitration agreements should mirror similar provisions that existed in respect of litigation in national courts, for example, article 3 (c) of the Convention on Exclusive Choice of Court Agreements prepared by the Hague Conference on Private International Law and adopted on 30 June 2005, which provided that "an exclusive choice of court agreement is required to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be useable for subsequent reference". It was also said that a similar reference to "concluded or documented in writing" was reflected in article 76 of the draft convention on the carriage of goods [wholly or partly] [by sea] currently being developed by the UNCITRAL Working Group on Transport Law (see, A/CN.9/WG.II/WP.140/Add.1, annex).

54. It was suggested that the words "concluded or documented" be considered for insertion under paragraph (2) of the revised draft article 7, as these words would clarify that the form requirement applied not necessarily at the stage of the formation of the arbitration agreement, but could also apply at the subsequent stage of evidencing the existence of the arbitration agreement. In support of that proposal, it was said that these words would be useful to encourage a liberal interpretation of the form requirement under article II, paragraph (2), of the New York Convention. A proposal was made that paragraph (2) of the revised draft article 7 should read: "The arbitration agreement shall be in writing. 'An agreement in writing' means an agreement concluded or documented in any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference." That proposal received some support. A proposal was made to simplify that text, as follows: "The

arbitration agreement shall be in writing. An agreement is 'in writing' if it is concluded or documented in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message." In support of that proposal, it was stated that it would cover both situations where writing was required for validity or for evidentiary purposes.

55. Questions were raised as to whether the terms "concluded" and "documented" were both needed as it was widely felt that the term "documented" encompassed the term "concluded". In response, it was said that if only the term "documented" were used, that provision might be interpreted in a very restrictive way as only applying where an agreement was concluded in writing. For that reason, it was suggested that both terms were needed.

56. Objections were raised on the ground that inclusion of those terms introduced issues related to proving the existence of an arbitration agreement that fell outside the intended purpose of paragraph (2) of the revised draft article 7, which related to the requirement that an arbitration agreement be in writing. A proposal was made to delete any reference to those words so that the revised paragraph would read: "The arbitration agreement shall be in writing. An agreement is "in writing" if it is in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message". The Working Group took note of that proposal.

Proposals for restructuring paragraphs (2) and (3) the revised draft article 7

57. It was observed that paragraph (2) of the revised draft article 7 sought to deal with different issues, namely:

- To state the principle that an arbitration agreement shall be in writing;
- To determine whether the purpose of the writing requirement was to provide certainty as to the consent of the parties to arbitrate or as to the contents of the arbitration agreement; and
- To clarify how the writing requirement could be fulfilled.

58. A proposal was made to address each of these issues by including text along the following lines: "The arbitration agreement shall be in writing. An arbitration agreement is in writing if it can be evidenced in writing. A data message meets the requirement of a writing if the information contained therein is accessible so as to be useable for subsequent reference. 'Data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy." That proposal received some support.

59. A related proposal was made to replace paragraphs (2) and (3) of the revised draft article 7 by the following restructured provision: "(2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its terms are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference." It was explained that the latter proposal had the following advantages:

- The language used in paragraph (2) of that proposal was consistent with article II, paragraph (2), of the New York Convention and therefore, that sentence maintained "the friendly bridge" between the texts;
- Paragraph (3) of that proposal by referring to "its terms are recorded" made it clear that only the terms of the arbitration agreement were required to be recorded and not the actual will of the parties to enter into the arbitration agreement. In that context, it was pointed out that the question whether the parties actually reached an agreement to arbitrate should be left to national legislation;
- The language used in paragraph (4) of the proposal was consistent with that used in paragraph (2) of article 9 of the Convention on Electronic Contracts.

60. That proposal was widely supported. However, clarification was sought on a number of aspects thereof.

61. Questions were raised as to whether the words "its terms" in paragraph (3) of the above proposal (see above, paragraph 59) were necessary given that the existence of an agreement to arbitrate assumed the existence of terms relating thereto. After discussion, the Working Group was generally of the view that some reference to the contents of the arbitration agreement should be retained to make it clear that what was to be recorded was the content or terms of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement. In response to questions regarding the scope of the words "its terms", divergent views were expressed. One view was that the reference to the "terms" of the contract could be interpreted as covering all of the contractual stipulations applying between the parties. Another view was that the "terms" of the agreement could be read more broadly to encompass, for example, the arbitration rules agreed upon by the parties or the law governing the arbitral procedure to the extent the parties did not agree on any procedural rules. It was also explained that "its terms" was not restricted to terms agreed by the parties expressly but could also cover agreements concluded by conduct, for example where one party sent an offer to conclude a contract to the other party which contained an arbitration agreement and the other party, without expressly accepting the offer, performed its part of the bargain (for example, it shipped the goods and paid the price).

62. To avoid a possible unclear or overly broad interpretation that could flow from the use of the word "terms", a proposal was made to replace that word with a more generic one such as "content". That proposal received some support. However, it was suggested that the phrase "its content is" might be improved upon. In order to provide a better formulation, it was proposed to redraft paragraph (3) of the above proposal (see above, paragraph 59) to read as follows: "an arbitration agreement is in writing if there is a record of the agreement in any form whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by any other means". It was suggested that that text should be accompanied by explanatory material in a guide to enactment and use. Another proposal was made that paragraph (3) be redrafted as follows: "an arbitration agreement is in writing if the rules applicable thereto are embodied in a recorded text". The Working Group did not agree that either of these formulations should be adopted but agreed that further clarification might be needed to be included in a guide to enactment and use in

respect to the factual situations that were intended to be covered by paragraph (3), such as those listed in A/CN.9/WG.II/WP.110, paras. 16 to 26. The Working Group requested the Secretariat to revise the text taking account of those suggestions, with appropriate explanations being provided in a guide to enactment and use of article 7.

63. In response to a question, it was explained that the words "or contract" in paragraph (3) of the above proposal (see above, paragraph 59) were intended to address the issue of incorporation by reference in a contract of an arbitration agreement. It was noted that the question of incorporation by reference was a matter to be further considered when discussing paragraph (5) of the revised draft article 7 (see below, paragraphs 69 to 73).

64. A suggestion was made that the words "electronic communication" contained in paragraph (4) of the above proposal (see above, paragraph 59) should be replaced by the words "electronic means" for the reason that the latter formulation was broader and covered a wider range of factual situations. After discussion, the Working Group agreed to retain the words "electronic communication" and to include under paragraph (4) of the above proposal the definition of "electronic communication" and "data message" as contained in paragraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.

Paragraph (4) of the revised draft article 7

65. A proposal was made that, in order to meet the variety of submissions that were used in modern arbitration practice in addition to the statement of claim and defence, paragraph (4) of the revised draft article 7 should be redrafted as follows: "Furthermore, an arbitration agreement is in writing if it is contained in an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement is alleged by one party and not denied by the other party in such submissions". In response, it was stated that the term "submission" might be too vague and a source of ambiguity. As well, it was said that the terms "statement of claim" and "statement of defence" had well established and broad meaning in arbitral and litigation practice. Doubts were also expressed as to whether the reference to "written" submissions was appropriate and whether the words "arbitral or legal" sufficiently differentiated arbitral practice from court litigation.

66. Questions were raised whether paragraph (4) should be maintained, given that paragraph (3) of the above proposal (see above, paragraph 59), already included arbitration agreements concluded by conduct. In support of its retention, it was said that paragraph (4) provided an illustration of a specific situation, namely where the arbitration agreement was alleged by one party and not denied by the other. The view was expressed that at least the situation where an exchange of statements would evidence an arbitration agreement concluded elsewhere was not covered by paragraph (3) of the above proposal (see above, paragraph 59).

67. A suggestion was made that paragraph (4) should include more generic language to cover situations where parties communicated on the merits of the dispute. It was suggested that paragraph (4) should be redrafted in order to cover cases where no arbitration agreement existed but a party nevertheless submitted a claim to arbitrate which was not opposed by the other party.

68. After discussion, the Working Group agreed to retain paragraph (4) of the revised draft article 7 without modification notwithstanding some reservations that

it might cover some of the situations dealt with under articles 4 and 16, paragraph (2) of the Arbitration Model Law as well as paragraph (3) of the above proposal (see above, paragraph 59). It was said that paragraph (4) was useful, since the narrow scope of article 4 of the Arbitration Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence merely by virtue of the exchange of statements of claim and defence and since paragraph (4) was more specific than article 16, paragraph (2) of the Arbitration Model Law.

Paragraph (5) of the revised draft article 7

69. The Working Group recalled that one of the main purposes of paragraph (5) was to address factual situations such as the case where a maritime salvage contract was concluded orally by radio with reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form or a contract concluded orally but subsequently confirmed in writing or otherwise linked to a written document containing an arbitration clause, such as the general sale or purchase conditions or reference to existing rules of arbitration proposed unilaterally by a party and communicated to the other. The Working Group agreed to maintain the provision on the basis that it corresponded to modern practices.

70. Taking account of the decision of the Working Group to amend paragraph (2) of the revised draft article 7 (see above, paragraphs 50 to 64), which addressed a number of situations already covered by paragraph (5) of the revised draft article 7, a proposal was made to simplify the drafting of paragraph (5) to deal only with the issue of incorporation by reference as follows: "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, if the reference incorporates that clause into the contract." That proposal received some support.

71. A comment was made that the words "if the reference incorporates that clause into the contract" might be understood as requiring stricter conditions for a valid conclusion of an arbitration agreement than the 1985 text of the Arbitration Model Law and that therefore the existing language on that point should be maintained. To that end, the following text was proposed: "provided that the reference is such as to make that clause part of the contract". It was said that it was preferable to avoid departure from the wording of the Arbitration Model Law, which was widely understood as deferring to applicable law to determine what linkage between the reference and the clause was needed to incorporate the clause into the contract. After discussion, the Working Group agreed to maintain the original wording of the 1985 text of the Arbitration Model Law.

72. It was said that the scope of application of paragraph (5) should be limited. To that end, a proposal was made to add at the end of paragraph (5) the words "and if arbitration agreements are customary for such contracts". That proposal was objected to on the basis that it was too restrictive and created different categories of contracts, which might be unfamiliar in certain jurisdictions. The use of the word "customary" was considered to be vague and open to potentially diverging interpretations. It was recalled that the Arbitration Model Law did not provide a substantive rule as to the application of incorporation by reference but rather left its determination to national laws.

73. After discussion, the Working Group agreed that paragraph (5) would read as follows: "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

Reconciling the conflicting approaches on the form of arbitration agreement

74. It was recalled that the Working Group's intention in revising article 7 of the Arbitration Model Law had been to update domestic laws on the question of the writing requirement for the arbitration agreement, while ensuring access to enforcement under the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal, see above, paragraph 47). A suggestion was made and adopted that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.

75. The Working Group agreed to further consider the drafting of the alternative proposal, based on the text contained in A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1. It was said that the main purpose of the alternative proposal was to delete paragraph (2) and only retain paragraph (1) of article 7 of the Model Law. The Working Group agreed that the last sentence of paragraph (1) which read: "[An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.]" should be deleted and the alternative proposal would read as follows: "'An arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

Article 35, paragraph (2) of the Arbitration Model Law

76. The Working Group considered whether revision of article 7 impacted on paragraph (2) of article 35 of the Arbitration Model Law (see above, paragraph 48). It was proposed that paragraph (2) of article 35 of the Arbitration Model Law be amended to omit the requirement to submit the original arbitration agreement, a duly certified copy or any translation thereof such that the provision would read: "The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a certified copy thereof. If the award is not made in an official language of this State, the party shall supply a translation thereof into such language." It was stated that, irrespective of the option chosen by an enacting State in respect of revisions to article 7, the amendment to article 35 should be effected.

77. Some concerns were expressed with the proposed deletion of the requirement to provide the arbitration agreement in paragraph (2) of article 35. It was said that that modification could introduce inconsistency between the Arbitration Model Law and article IV of New York Convention, which required that the arbitration agreement or a certified copy thereof be presented. On the other hand, it was noted that article VII, paragraph (1), of the New York Convention recognized the right of a party to enforce an arbitral award in the manner allowed by applicable national law. It was also stated that deleting the requirement to provide the arbitration agreement

would impact negatively on article 36 of the Arbitration Model Law where the grounds upon which enforcement of an award might be refused rested on the terms of the arbitration agreement. It was noted that the 1985 text of the Arbitration Model Law already included a footnote to paragraph (2) of article 35, which explained that the conditions set forth in that paragraph were intended to set maximum standards and thus left it open to a State to impose less onerous conditions to be met by a party seeking enforcement. The view was expressed that it was therefore unnecessary to delete the reference to the arbitration agreement from the text of paragraph (2) of article 35.

78. Nevertheless, after discussion, the Working Group agreed that the requirement to provide the arbitration agreement could be dispensed with under paragraph (2) of article 35 and that if the award was not made in an official language of the State, then the court might, but was not obliged to, require the requesting party to provide a duly certified translation thereof.

79. It was further proposed to delete from the revised draft paragraph (2) of article 35 the words "duly authenticated" used in relation to the award as these words had given rise to problems in practice and were open to different interpretations. That proposal was adopted by the Working Group.

80. It was agreed that paragraph (2) of article 35 be redrafted as follows: "The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language." It was agreed that the existing footnote to paragraph (2) of article 35 should be maintained without modification. It was noted that flexibility with respect to the submission of the translation into the language of the court existed in a number of legal systems and that it was desirable to recommend that national legislators consider adopting such a flexible approach.

VI. Explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement

81. The Working Group agreed that explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19, 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures, preliminary orders and the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.

VII. Draft interpretative instruments regarding article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

82. The Working Group recalled that, at its thirty-sixth session, it discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention and to achieve a higher degree of uniformity. At its thirty fourth session (Vienna, 25 June-13 July 2001) (A/56/17, para. 313), the Commission agreed that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision set out in article VII, paragraph (1), of the New York Convention. For that purpose, the Working Group had agreed to postpone its discussions regarding the writing requirement and the New York Convention.

83. In view of the progress that had been made at the current session in connection with the writing requirement under the Arbitration Model Law, the Working Group considered the draft interpretative instrument on article II, paragraph (2), of the New York Convention, reproduced in A/CN.9/508, para. 41 as well as the draft interpretative instrument on article VII, paragraph (1), of the New York Convention contained in A/CN.9/WG.II/WP.139, para. 37.

84. Questions were raised as to the legal status in international law of an interpretative instrument. It was questioned whether a non-binding interpretative instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention. In that respect, it was suggested that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the application of article II, paragraph (2), of the New York Convention and that the Working Group should focus instead on the preparation of an amending protocol to the New York Convention. On the other hand, the view was expressed that, in order to increase the persuasive value of the instrument, the interpretative declaration should be endorsed by the General Assembly of the United Nations. The view was also expressed that UNCITRAL, as the core legal body in the United Nations system in the field of international trade law, would be the best body to adopt such a declaration.

85. Concerns were expressed that declarations interpreting either article II, paragraph (2), or article VII, paragraph (1), of the New York Convention would give an indication that article II, paragraph (2), did not already provide for a liberal, flexible and broad approach to the form requirement and that adopting such a declaration ran the risk of upsetting such interpretation that article II, paragraph (2), of the New York Convention already enjoyed in some jurisdictions. However, taking account of the diverging and sometimes conflicting interpretations that existed in relation to the application of article II, paragraph (2), the Working Group agreed that guidance on that matter would be helpful.

86. The Working Group proceeded to consider the text of the draft interpretative declaration on article VII, paragraph (1), of the New York Convention. In support of adopting that declaration, it was said that that approach would encourage the

development of rules favouring the validity of arbitration agreements in a wider variety of situations. It was explained that the declaration on article VII, paragraph (1), of the New York Convention would encourage States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcements laws and it was observed that the recommendation contained in paragraph 13 of the draft declaration was not limited to the question of the arbitration agreement, but was broad enough to encompass any aspect of the enforcement procedure.

87. A suggestion was made that it would be preferable to include, in the draft declaration on article VII, paragraph (1), of the New York Convention, provisions clarifying the meaning of article II, paragraph (2), of the New York Convention. It was recalled that article II, paragraph (2), had been the subject of different interpretations in State courts, resulting from the differences of expression between the five equally authentic texts of the Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of "agreement in writing" (by using the word "includes") appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.

88. In order to address those concerns, it was said that the draft interpretative declaration on article VII, paragraph (1), of the New York Convention should include a statement on the interpretation of article II, paragraph (2), of the New York Convention. It was decided that the draft interpretative declaration regarding article VII, paragraph (1), of the Convention, as it was reproduced in A/CN.9/WG.II/WP.139, should be retained subject to two amendments. First, paragraph 10 of the declaration should be amended by adding the words "particularly with respect to article 7" after the words "as subsequently revised". Paragraph 10 of the draft declaration would therefore read: "Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts," Secondly, a new paragraph, numbered paragraph 13, could be inserted, as follows: "Recommends that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,". It was noted that that amendment would require that paragraph 13 be renumbered as paragraph 14 and the title of the declaration should be revised to refer to the interpretation of articles II, paragraph (2) and VII, paragraph (1). Those amendments were agreed to by the Working Group.

VIII. Possible future work in the field of settlement of commercial disputes

89. The Working Group undertook preliminary discussions regarding the desirability and feasibility of undertaking work on various issues, outlined in previous documents (A/CN.9/468, paras. 107-109; A/55/17, para. 396; A/60/17, para. 178) and the priority consideration that might be given to those issues.

90. The possible new topics upon which the Working Group was invited to focus its attention, included: possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); online dispute resolution (ODR); and State immunity in light of the recently adopted International Law Commission Convention on Jurisdictional Immunities of States and their Property (hereafter "the Jurisdictional Immunities Convention").

91. It was stated that all the listed topics were worthy of consideration and that topics such as sovereign immunity and arbitrability might require the development of a binding instrument to be effectively addressed. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.

92. On the question of State immunity, the Working Group noted that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation.

93. On the topic of revision of the UNCITRAL Arbitration Rules, it was noted that these Rules would have their thirtieth anniversary in 2006 and that conferences were to be convened by the Secretariat to discuss ideas and areas for possible revision of those Rules. Although reservation was expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any needed revision would be of positive benefit to practitioners in international arbitration. In that respect, it was noted that a number of arbitration institutions had undertaken a revision of their arbitration rules based on the UNCITRAL Arbitration Rules. The work of those arbitration institutions could be made available to assist the Working Group in any review of the UNCITRAL Arbitration Rules. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be

undertaken with practitioners to develop a list of topics on which updating or revision was necessary.

94. Another possible topic suggested for consideration to the Working Group was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request "within its competence and according to its rules on taking evidence". It was suggested that article 27 could be revised to oblige a court to render such assistance. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations.

95. The Working Group took note of the above suggestions.

IX. Other business

96. The Working Group took note of the discussions in Working Group III (Transport Law) at its sixteenth session (Vienna, 28 November-9 December 2005) as to the compatibility of the New York Convention and the Arbitration Model Law with the draft article 83 (Arbitration Agreements) of its draft convention on the carriage of goods [wholly or partly] [by sea] and a suggestion that the opinion of the Working Group on Arbitration should be sought (see paras. 101-103 of A/CN.9/591).

97. As a result, the Working Group requested the Secretariat to convene an informal joint group of experts drawn from both Working Groups to assist the Secretariat to report on these matters as a matter of urgency at the next sessions of the two Working Groups.

Annex I

Revised legislative provisions on interim measures and preliminary orders

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application

for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 - Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an interim measure may be refused only:

(a) at the request of the party against whom it is invoked if the court is satisfied that:

(i) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

* The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) if the court finds that:

(i) the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

Other provision of the Arbitration Model Law to be amended

Article 1, paragraph (2) of the Model Law

(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Annex II

Revised legislative provisions on the form of arbitration agreement

(1) Revised draft article 7

Article 7. Definition and form of arbitration agreement

(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its [terms are] [content is] recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "Electronic communication" means any communication that the parties make by means of data messages; "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy .

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract

(2) Alternative proposal

Article 7. Definition of arbitration agreement

'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Other provision of the Arbitration Model Law to be amended

Article 35, paragraph (2) of the Model Law

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

Annex III

Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

"Declaration regarding interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

"The United Nations Commission on International Trade Law,

"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

"[2] *Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes',

"[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

"[9] *Considering* the wide use of electronic commerce,

"[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

"[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

"[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

"[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

"[14] *Recommends* that article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."